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In The

# Supreme Court of the United States

ROBERT A. LEVY AND PHYLLIS B. LEVY,

*Petitioners,*

vs.

WILLIAM A. ENGLUND,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Arizona Court of Appeals, in an unpublished and uncitable thirty-five page memorandum decision, in multiple instances disregarded and overruled established law in Arizona, relied on numerous misstatements and omissions of material fact to affirm an invalid judgment for attorneys' fees as sanctions by a judge pro tempore sympathetic to counsel for respondent, and awarded attorneys' fees on appeal as sanctions against petitioners who prevailed on appeal. It turned a blind eye to witness tampering by counsel for respondent and denied petitioners' motions to supplement the record, to refer to other appeals court cases, and for oral argument, and affirmed the denial of petitioners' due process claims and their request for change of judge, thereby wrongfully destroying elderly petitioners' personal reputations and depriving them of more than $200,000 saved for their old age.

The question presented is whether the courts of Arizona violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert A. and Phyllis B. Levy (the Levys) respectfully request that a writ of certiorari be issued to review the Memorandum Decision of the Court of Appeals of the State of Arizona in this case.

## CITATIONS OF OPINIONS AND ORDERS BELOW

The Memorandum Decision of the Court of Appeals of Arizona is unpublished (App. 1-36). The findings of fact, conclusions of law, and judgment of the Superior Court of Maricopa County is unpublished (App. 39-58).

## STATEMENT OF JURISDICTION

The Memorandum Decision of the Court of Appeals of Arizona was entered on July 23, 2009 (App. 1). Motions for Reconsideration in the Court of Appeals were denied on September 4, 2009 (App. 37-38). The Supreme Court of Arizona denied the Levys' timely filed cross-petition for review on January 5, 2010 (App. 61).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

– U.S. CONST., amend. XIV, § 1.

## SPECIFICATION WHERE FEDERAL QUESTION WAS RAISED

The question of the adequacy of the hearing procedure was initially raised in the Levys' motion for new trial and amended motion for new trial (App. 62-80). The superior court denied the motion without comment (App. 60). The Levys raised this question again in their opening brief. The Memorandum Decision of the Court of Appeals, at ¶¶57-60 (App. 29-31) rejected these procedural due process arguments and affirmed the denial of the Levys' amended motion for new trial at ¶69 (App. 35). The Levys again raised these issues in their cross-petition for review in the Supreme Court of Arizona. The Levys attacked the attorneys' fees as sanctions imposed by the Court of Appeals by showing their discriminatory nature in their motion for reconsideration in the Court of Appeals and in their cross-petition in the Supreme Court of Arizona. The Levys attacked the discriminatory nature of an unpublished opinion in their motion to publish the memorandum decision in their first appeal *Levy v. Englund (Levy I)*, 1 CA-CV 04-0161 (2005) and in their petition for review in the

Arizona Supreme Court in *Levy I* which was denied on February 7, 2006.

## STATEMENT OF THE CASE[1]

This is an attorneys' fee case, which came about because the Levys were prevented from putting on their case in the trial court by a biased judge pro tempore brought in at the last minute to try the case when the assigned judge, who had set the trial date, said he was in the middle of another case. The Court of Appeals affirmed the dismissal but vacated an award of more than $140,000 in attorneys' fees and associated expenses to respondent William A. Englund (Englund) and remanded for hearing (App. 4). At the fee hearing, for which Englund and the trial court prevented the Levys from preparing, Englund's attorney Leon B. Silver, Esq. (Silver) put on Englund's original defense with his own testimony over the Levys' objections, and the same judge then

[1] The Memorandum Decision of the Arizona Court of Appeals (Decision) (App. 1-36) consists of sixty-nine numbered paragraphs ("¶"), of which ¶¶2-22, FACTUAL AND PROCEDURAL HISTORY (App. 2-10), presents an alternative statement of the case, containing numerous misstatements and omissions of material facts, based on the Findings of Fact, Conclusions of Law, and Judgment (Findings) (App. 39-58) entered by the lower court, which itself is based on the testimony of Leon B. Silver (Silver), attorney for respondent, who said that his testimony was not to show the truth of what he said, only to show his state of mind (App. 71-72).

signed a judgment presented in advance by Silver giving Englund nearly $300,000 in fees as sanctions, including fees explicitly denied by appellate courts (App. 57-58). The Court of Appeals affirmed the judgment but reduced the award by the approximately $80,000 in fees denied by appellate courts (App. 25, ¶50), but then awarded Englund nearly $20,000 as sanctions (App. 38) against the Levys for appealing (App. 33-35), leaving the door open for additional sanctions on remand (App. 36). The fundamental issue is whether the Levys were denied due process and equal protection in having their reputations ruined and in being forced to pay almost $300,000 in unjustified attorneys' fees and related expenses as sanctions for having the temerity to go to court.

### 1. Circumstances That Precipitated Lawsuit

The Levys are residents of Texas.[2] While living in Phoenix in 1959, they bought a five-acre horse ranch lot (Lot 9). They moved away from Arizona before developing Lot 9, but leased it in 1990 to their neighbors, Dennis and Yvonne Hilker, who operated a horse boarding business on their five-acre lot (Lot 10), which adjoins the east side of Lot 9. The Hilkers had been using Lot 9 to run their horses since 1987, but

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[2] Robert Levy is a retired lieutenant commander in the U.S. Navy and the author of *Principles of Solid State Physics* (Academic Press, 1968).

finally signed a lease to pay rent (App. 89). Nothing in the lease allows dumping, whether it be manure or anything else. In December, 1993, the Hilkers sold Lot 10 to respondent Englund, who took over the horse boarding operation (App. 3, ¶5).

The Hilkers had left an accumulation of miscellaneous debris, including vehicle bodies, construction debris, and household trash, but not observable manure on Lot 9. The Levys had discussed the need to remove those objects with the Hilkers when they visited Lot 9 in the spring of 1994; however, Englund also wanted to rent Lot 9 and indicated in lease negotiations that he would provide the clean-up, relieving the Hilkers of this obligation, because he could not use the property in the condition the Hilkers had left it. In July, 1994, the Levys again visited Lot 9, this time making a videotape record (which showed no accumulation of manure) as they drove around the property (App. 50, paragraph 32). A week later the Levys were nearly killed when the car in which they were driving was struck by a truck owned by Swift Transportation Company,[3] a client of the law firm representing respondent Englund, and they forgot about having made the videotape, which they later discovered, made a copy for Englund, and introduced as part of their summary judgment evidence.

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[3] Swift Transportation Co. was a defendant in a lawsuit filed by the Levys, *Levy et ux v. Swift Transportation Co., et al.*, 529 U.S. 1055, (2000) and *Levy et ux v. Swift Transportation Co., et al.*, 536 U.S. 959 (2002).

The Levys and Englund agreed on a low rate of rent in exchange for Englund's agreement to clean up the property. They entered into a lease agreement on August 1, 1994 to use the property through December 31, 1998, for $13,250, payable in monthly installments of $250, plus a portion of the annual taxes (App. 91-92). Englund fenced, gated, and locked the south side of the lot, the north and west sides having been fenced by the neighboring property owners (App. 42, paragraph 14). A pipe rail fence along the east side separated Englund's Lot 10 from the Levys' Lot 9, with a wide gate in the middle allowing vehicular access between the two lots. In November, 1997, the parties agreed to increase the monthly payment from $250.00 to $355.00 to cover increases in the annual taxes by equal monthly payments (App. 41, paragraph 10). The lease included a provision that the property be returned in "good order and condition" (App. 92). Both parties agree that the property was not delivered to Englund in 1994 in good order and condition.

In November 1998, Englund sent the Levys a proposed addendum for a lease renewal, which was less favorable to the Levys than the original lease (App. 41, paragraph 11). The Levys made a written counteroffer to which Englund made no response, prompting the Levys to send Englund a letter dated December 15, 1998, advising him that if they heard nothing further from him, they would assume he was continuing to use the property after December 31, 1998 (App. 41, paragraph 13).

Englund made no direct response to this letter, but on January 12, 1999, the Levys received a $355.00 check from him dated January 3, 1999 – the same amount of monthly rent Englund had been paying during the previous year pursuant to their agreement (App. 42, paragraph 16). The Levys believed this payment to be Englund's intention to continue renting the property at the same rate. Then, on February 16, 1999, the Levys received another check from Englund for $313.64 (App. 42, paragraph 17). At that point they realized that Englund's two payments added up to the unpaid taxes (App. 42, paragraph 18). The Levys visited the property in March, 1999, and observed that Englund's lock was still on the gate and sent him a certified letter requesting that his rent be brought up to date. They visited the lot periodically after that and always observed Englund's lock still on the gate. The Levys continued to send monthly account balance statements to Englund through January 2001, when they contacted an attorney, who sent a letter to Englund demanding payment, to which he never responded (compare App. 42, paragraphs 16-19). In June, 2001, Ms. Donna Cook, an inspector for the City of Phoenix who had received a complaint about weeds growing on Lot 9,[4] was advised by the Levys that Englund controlled the property. She observed Englund's lock on the gate and contacted Englund, who said he no longer leased the

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[4] At the arbitration hearing on Feb. 1, 2002, Englund's daughter admitted having made the complaint to the City.

property. When she and Robert Levy met at the property on July 13, 2001, they both observed that the lock was gone. Ms. Cook secured the gate with one of her locks. Because the front gate was padlocked until June 2001 with Englund's lock, the only access to Lot 9 was from Englund's property, Lot 10.

In September, 2001, Robert Levy, Phyllis Levy, and their daughter Carolyn cleared the weeds from Lot 9 as required by the City of Phoenix. They saw huge piles of manure, much of it fresh and smelly, directly west of the gate between Lot 9 and Lot 10. They noticed that an area between the fence separating the two properties and the manure piles had already been cleared of weeds, with vehicle tracks in the dirt. They made videotape of the property including the manure piles, which they later introduced as part of their summary judgment evidence. The miscellaneous vehicle bodies and other metal objects were still on the property.

**2. Proceedings Through Dismissal Of Case.**

The Levys filed their original complaint on July 13, 2001, alleging breach of contract claims for unpaid rent of $16,500 by Englund from January 1, 1999, through June 30, 2001, at a monthly rate of $550.00, based on the Levys' letter to Englund dated December 15, 1998. The case was assigned for arbitration because the original complaint claimed less than $50,000 in controversy.

At the arbitration hearing held February 1, 2002, Englund represented he had receipts showing a commercial waste company had regularly removed the manure generated in his horse-boarding operation, but he failed to produce them. Following the Levys' appeal to the Superior Court, Englund's attorneys spent numerous hours fighting the Levys' request to produce the alleged receipts. The Superior Court, Judge J. Kenneth Mangum presiding, granted the Levys' motion to compel and ordered Englund to produce the receipts. Had the Levys been allowed to present their case, they would have shown that the receipts Englund thereafter produced were not for removal of manure (compare App. 49, subparagraph c.).

The arbitrator awarded no damages to the Levys and ruled the parties should bear their own costs. Following the arbitration, in or about March, 2002, Englund offered to buy Lot 9 from the Levys for $300,000 (see App. 40, paragraph 3), which the Levys declined.

Judge Mangum originally set a trial date for September, 2002, but postponed it to December 17, 2002, after his calendar had been transferred to Judge Robert D. Myers. Not counting the arbitrator, this case has had eight judges. It was assigned initially to Judge Mangum in July 2001. He retained jurisdiction through the arbitration, the appeal, the amended complaint and motions to compel production, until July, 2002, when his calendar was given to Judge Myers. When Judge Myers recused himself in

December, the case was assigned to Judge Gary E. Donahoe. In June, 2003, Judge Donahoe's calendar was assigned to Judge Thomas Dunevant. When the Levys exercised their right to change of judge, the case went to Judge Robert L. Gottsfield, who transferred it to pro tem Judge Patrick E. Eldridge, on the trial date, November 19, 2003, where it has remained ever since, even though Judge Gottsfield remained the assigned judge until his calendar was transferred to Judge Peter Swann, who then became the assigned judge until his calendar was assigned to Judge L. Grant.

At the pretrial conference on December 5, 2002, Mr. Levy asked Judge Myers if he would permit Mr. Levy to testify in a narrative fashion from notes. Judge Myers indicated he would allow this only if there was no objection. Englund failed to object during this or any other pre-trial conference or proceeding. Judge Myers urged the parties to settle the case before trial and he set an additional pre-trial conference the following week. Immediately following the hearing, Englund's attorney Silver warned Robert Levy that if he did not settle by dropping his case, he would be subject to $30,000 in attorneys' fees. He further warned Levy that he could not present his evidence of false documents regarding dumping manure by Englund to the jury. Silver later testified falsely that that conversation consisted instead of Robert Levy telling Silver he would make the case as expensive as possible for Englund (App. 17, ¶35).

Silver's testimony is summarized in the Findings (App. 44, paragraph 27).

Both sides filed motions for summary judgment on June 23, 2003, and Judge Gottsfield held telephonic hearings on these motions beginning on August 28, 2003. The Levys moved for partial summary judgment on the ground that no issue of disputed fact existed as to whether Englund owed rent for January and the first half of February, 1999. Englund moved for summary judgment on the alleged grounds that the property damage claim was barred by the statute of limitations; the contract did not require that he return property in any better condition than it was received; and that he did not use the property after expiration of the lease.

Throughout the litigation, Englund's attorney Silver repeatedly sought sanctions from the Levys. Later he claimed that the Levys had unreasonably increased his workload by their litigation tactics, which actually were primarily in response to his attacks. At no time did any of the judges allow sanctions against the Levys. Silver has consistently engaged in the abusive tactics of which he accuses the Levys.

The Levys submitted extensive evidence for the summary judgment proceedings indicating that Englund used the Levys' property to dump the manure generated in his horse boarding operation and continued to use it until at least September, 2001, including 1) videotape of the property from July 14,

1994 (App. 50, paragraph 32), 2) their own testimony, 3) Declaration of Laura Palmer, 4) Declaration of Jim Wenger (App. 81-83), 5) videotape of fresh manure September, 2001, 6) failure of receipts produced by Englund to show hauling away of manure (App. 49, subparagraph c.), and 7) declaration of Donna Cook, Phoenix City inspector.

From long-distance telephone conversations in July, 2003, the Levys obtained a Declaration from professional horse trainer Jim Wenger testifying that he saw manure being dumped from tractors and wheelbarrows from Englund's property onto Lot 9 continually from 1994 until at least 2000 (App. 82, paragraphs 7-9). Englund's attorney Silver then personally visited Mr. Wenger and got him to sign two more Declarations, the first in August, 2003 (App. 84-85) to prepare for his Reply in Support of Motion for Summary Judgment, and another on December 30, 2003 (App. 86-88), after the case had been dismissed, to support his exorbitant claims for attorneys' fees. A reading of these three Declarations shows how Silver's "lawyering" as he put it, amounts to witness tampering (App. 81-88). See the Levys' Amended Motion for New Trial (App. 75-77). Silver engaged in similar tactics with the Levys' other witnesses, including Laura Palmer Manos, Brad Drenning, and Glen Ghormley (App. 46-49), except that he was unable to obtain affidavits from them.

At the August 28 hearing Judge Gottsfield set the final pre-trial conference pursuant to Rule 16(d), Arizona Rules of Civil Procedure, for November 7,

2003, and the trial date for November 12, 2003. At the final hearing on the summary judgment motions on October 8, 2003, Judge Gottsfield denied both summary judgment motions, indicating that fact issues were present. At hearing October 30, Judge Gottsfield advised the parties that he had a conflict and would be unable to conduct the trial on November 12. On November 7, 2003, Judge Gottsfield ruled on various pending motions, including the Levys' motions in limine (which the court granted in part and denied in part) and Englund's notice of non-party at fault, where he was trying to blame everything on the Hilkers, who could no longer be sued (which the court denied). Because of the time consumed on the pending motions, no time remained to complete pre-trial conference issues as envisioned by Rule 16(d), such as the manner of testimony. Instead of continuing the Rule 16(d) conference and the trial until he could conduct it, he brought in a retired lawyer, pro tem judge Patrick E. Eldridge, a former Deputy Maricopa County Attorney,[5] to conduct the trial on November 19, 2003 and any post-trial motions, although Judge Gottsfield remained the assigned judge.

On November 12, 2003, the Levys fax-filed and served their Motion to Continue Trial or Order Follow-up Pre-Trial Conference, to allow Judge

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[5] The Levys sued the County of Maricopa in 2000 (*Levy v. County of Maricopa*, TX2000-000380 (2003)) and obtained a reduction of the valuation of Lot 9 (App. 45, paragraph 30).

Gottsfield to rule on pre-trial issues, including narrative testimony by the Levys. Englund's response was to request that the court dismiss the Levys' complaint and award him costs and attorneys' fees, without addressing the question of the manner of the Levys' testimony. Judge Gottsfield summarily denied the Levys' motion.

On the trial date, for the first time in the action, Englund objected to Mr. Levy's proposed narrative testimony, contending that Judge Robert Myers had ruled on December 5, 2002, that Mr. Levy was required to obtain a stipulation from Englund's attorney to testify in the narrative. Despite the absence of such ruling, pro tem judge Eldridge sustained this objection, holding that Judge Myers' alleged ruling was "the law of the case."

Notwithstanding this erroneous ruling, Mr. Levy still tried to put on his case, indicating that he was prepared to proceed with trial by asking himself questions. For a second time, Judge Eldridge thwarted his attempt, refusing to allow Mr. Levy to ask himself questions. On top of this, the court compounded the injustice by ordering co-plaintiff Phyllis Levy, a non-lawyer, to conduct the direct examination of Mr. Levy and refused to allow the Levys to consult with each other or to take a break for lunch (it was close to noon). Having made the above erroneous rulings, the court then demanded to know whether Mr. Levy was ready to proceed, at which time Mr. Levy indicated he was not (because he had

planned to testify that afternoon). The court never asked Phyllis Levy whether she was ready to proceed.

Englund then orally moved that the case be dismissed. Judge Eldridge immediately granted his motion without allowing either Mr. or Mrs. Levy an opportunity to respond to the motion. Notwithstanding the lack of argument on the motion to dismiss, the court issued a minute entry the following day, November 20, 2003, stating that oral argument did take place on defendant's motion to dismiss.

On December 5, 2003, the Levys filed an application to remove Judge Eldridge for cause. Englund's response, filed December 15, 2003, included an injection, for the first time, of the Levys' unrelated lawsuit against Swift Transportation Company, including copies of court documents, into this case (Compare App. 8, ¶17). The Levys' application was denied, and they did not assign the denial as error in their appeal of the judgment, which awarded Englund a total of $118,566.97 in attorneys' fees, costs, and non-taxable litigation expenses (essentially everything that he requested).

### 3. The First Appeal *(Levy I)*

The Levys appealed (App. 2, Footnote 1), arguing that the superior court erred 1) in determining that a pro se litigant was foreclosed from providing his own testimony unless elicited by some other party, 2) in dismissing the Levys' action without giving either Robert Levy or Phyllis Levy an opportunity to oppose

Englund's motion to dismiss, and 3) that the attorneys' fees and associated expenses were excessive and padded and awarded without a hearing. During the appellate litigation, Judge Eldridge awarded Englund three supplemental judgments for additional fees, costs and expenses, bringing the total to $141,035.74.[6] In an unpublished Memorandum Decision entered March 10, 2005 and amended May 23, 2005 *(Levy I)*, the Court of Appeals affirmed the dismissal of the Levys' case but vacated the award of fees and costs, and remanded to the superior court for a hearing, holding that Englund had failed to substantiate the fees, noting that the award also included items that were disallowed by statute unless they were awarded as sanctions, and since the Levys' punitive damage and bad faith claims had been dismissed well in advance of trial and prior to the expenditure of fourteen working days in trial preparation for a projected 3 to 4 day trial (compare App. 8, ¶16 and App. 44, paragraph 26).[7]

Both sides filed petitions for review in the Arizona Supreme Court, and both were denied,

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[6] Of which the Levys paid $16,188.79 to satisfy the first supplemental judgment, against which they neglected to file a separate Notice of Appeal.

[7] The figure $1 million came about solely because Robert Levy said "Yes" when Silver asked if he would be happy if the jury awarded him $1,000,000 (App. 8, ¶16). Did Silver really believe he was litigating a million dollar case from that? The absurdity of Englund's case, the Findings, and the Decision is starkly illustrated by this contention.

including Englund's request for attorneys' fees in that court.

### 4. The Second Appeal *(Levy II)*

Following the mandate from the Court of Appeals, the Levys applied for a peremptory change of judge and also for a change of judge for cause, to have Judge Eldridge removed from the case. The presiding judge of the superior court, the Honorable Anna Baca, ordered the assigned judge, the Honorable Peter Swann, (who had taken over from Judge Gottsfield on rotation) to rule on the peremptory challenge, and she herself ruled on the challenge for cause,[8] both of which were denied. At a status conference with Judge Swann on July 27, 2006, the Levys asked Judge Swann to preside over the attorneys' fee hearing; Silver objected adamantly, and Judge Swann left the case with pro tem Judge Eldridge. Judge Swann ruled that the attorneys' fee hearing would be based on the prior applications and supplemental judgments and that any additional application for fees would be appropriate only if the Levys failed to prevail at the hearing. Judge Swann gave the Levys leave to file a special action in the Court of Appeals contesting the denial of their

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[8] The subject matter of Paragraphs 30 (App. 45) and 38 (App. 54) of the Findings relates primarily to the allegations of bias and interest on the part of Judge Eldridge. Since the motion for change of judge for cause was denied expeditiously by Judge Baca, Silver could not have spent much time on these issues.

peremptory challenge. The Court of Appeals accepted jurisdiction but affirmed the denial. It denied Englund's request for attorneys' fees for responding to the special action petition. The Levys appealed unsuccessfully to the Arizona Supreme Court, which again denied Englund's request for attorneys' fees.

Judge Eldridge set a scheduling conference for September 11, 2006, which he vacated ex parte and set a hearing date for November 7, 2006 on motion from Englund, who agreed to respond to the Levys' discovery requests within ten days of service. The Levys served discovery requests immediately requesting response by September 22, 2006, but Englund refused to comply; the Levys did not receive his incomplete response until October 17, 2006, leaving them insufficient time to analyze the more than 200 pages of material. Judge Eldridge denied the Levys' motions to compel and to continue the hearing date. On October 24, 2006, the Levys filed their supplemental brief in opposition to defendant's demand for attorneys' fees and costs, including an affidavit of economic hardship.

On Friday, November 3, 2006, Englund's attorney filed his fourth application for attorneys' fees and associated expenses, totaling more than $250,000, this time in sanctions, from which, according to Rules 6(a), 6(e), and 7.1(a), Ariz.R.Civ.P., the Levys should have had until November 22, 2006 to respond, before a hearing could even be scheduled, much less held.

Nevertheless, the fee hearing began at 1:30 p.m. on November 7, 2006 in Judge Swann's courtroom, Judge Eldridge presiding. Silver gave the Levys a copy of his proposed Findings of Fact, Conclusions of Law, and Judgment (Findings), which had already been served on Judge Eldridge. Judge Eldridge announced that he had received and read that submission. Silver also gave the Levys copies of the exhibits he intended to use in his presentation. At the outset, the Levys objected to the exhibits and the proposed Findings, pointing out that Englund was going to try the underlying case. Silver said that his testimony was not intended to prove the truth of what he said, but only to show how he needed to spend his time. Judge Eldridge overruled the Levys' objections. But even though Silver said that his testimony was not being offered for the truth of the matters asserted, the only basis for sanctions against the Levys is contained in that testimony, which forms the basis for the Findings that Silver prepared for Judge Eldridge to sign and for the Factual and Procedural History in the Decision (App. 2-10, ¶¶2-22). Silver laid out his version of the case, relating what witnesses Laura Palmer, Jim Wenger, Glen Ghormley, Brad Drenning, and Brent Bowles had allegedly told him, but not calling any witnesses except other attorneys. His expert witness Mr. Mark Harrison, admitted under cross-examination that he had not read the filings in the case; he merely counted them; he also admitted that judges in Arizona have a responsibility to protect unrepresented parties from aggressive tactics of opposing counsel. Englund's

presentation ended at 5:00 p.m., at which time Judge Eldridge said the hearing would have to be continued until the following month because the courtroom would not be available the next day. Silver suggested having it the next day in his office, to which the Levys objected, but acquiesced when no alternatives were presented. The following morning, when the hearing began at 9:40 in counsel's office, the Levys again objected, but were overruled. Mr. Levy began his cross-examination of Silver but was unable to finish it when Judge Eldridge advised the parties that he had to be out by 11:30. After Mr. Levy began his testimony, Silver suggested that he could complete it in writing. Judge Eldridge gave the Levys until November 15 to file their testimony. Thus the hearing consisted of three parts, a courtroom session on the afternoon of November 7 (Hearing I), a two-hour conference room session on the morning of November 8 (Hearing II), and filed on November 15, the Levys' twenty-page Objection to Defendant's Notice of Proposed Findings of Fact, Conclusions of law, and Form of Judgment, With Argument and Testimony (Hearing III) (App. 63-64) (ignored by Judge Eldridge since the Findings had already been submitted) and trivialized by the Court of Appeals (App. 10, ¶21, see App. 67, Footnote 2).

The Levys also filed a response to Englund's 4th application for fees on November 20; but on November 21, Judge Eldridge entered a signed verbatim copy of the proposed Findings (App. 39-58) submitted to him by Silver, imposing sanctions totaling

$279,901 against the Levys (App. 57-58). He exonerated the Levys' supersedeas bonds totaling $201,452.10 to Silver, and the Levys then sent Silver a check for $78,448.90 for the balance due on the judgment.

On December 5, 2006, the Levys filed their motion for new trial, followed by their Amended motion for new trial on January 2, 2007 (App. 62-80), alleging irregularities in the proceedings of the court which deprived the Levys of a fair trial and other errors. Judge Eldridge denied their amended motion without comment (App. 59-60) and entered a supplemental judgment granting Englund an additional $12,339.48[9] in attorneys' fees as sanctions over the Levys' objections, which the Levys paid by check to Mr. Silver. The Levys appealed the Findings and the supplemental judgment, and on June 15, 2007, filed their opening brief, alleging that sanctions were not allowed as a matter of law, that the evidence in support of sanctions is not credible or admissible, that the trial court failed to sanction Englund for witness tampering and other abuses, that attorneys' fees are not allowed as a matter of law, that the lower court denied the Levys adequate preparation for the hearing, that the fee hearing was improperly conducted by Judge Eldridge, that the lower court failed to give them a new trial and failed to remove Judge

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[9] Thereby bringing the total to $308,429.27 paid by the Levys to Englund, including the first supplemental judgment of $16,188.79 paid in July, 2004 (see Footnote 6).

Eldridge from the case for cause. Briefing was complete with the filing of the Levys' Reply Brief on September 14, 2007.

Nearly two years later, on July 23, 2009, the Court of Appeals entered a thirty-five page unpublished and uncitable Memorandum Decision (Decision) (App. 1-36), affirming the Findings but reducing the award of attorneys' fees by $79,759.39, which Englund had incurred in the appellate courts (App. 25, ¶50). It then awarded Englund attorneys' fees as sanctions against the Levys for bringing their appeal (App. 35, ¶68), totaling $19,349.50 in a subsequent order over the Levys' objections, including the fact that the fee request was untimely filed (App. 38), and it gave the lower court a green light to award additional sanctions on remand (App. 35-36, ¶69). Both parties' motions for reconsideration were denied (App. 37-38). Both parties' petitions for review in the Arizona Supreme Court were denied on January 5, 2010 (App. 61).

## REASONS FOR GRANTING THE WRIT

If this case had been in federal court, it would have qualified under Sup.Ct.R. 10(a), where a court of appeals, in this case the Arizona Court of Appeals in its Decision (App. 1-36) "has so far departed from the accepted and usual course of judicial proceedings,. . . . as to call for an exercise of this Court's supervisory power." It has also sanctioned such a departure by the

Superior Court of Maricopa County, in its Findings (App. 39-58) entered by pro tem Judge Patrick Eldridge, to such an extent that the Levys have been deprived of protections under the due process and equal protection clauses of the Fourteenth Amendment. In many ways the excessiveness of the Decision (e.g. ¶21,¶61,¶67)[10] and particularly the Findings (e.g. paragraphs 30, 38, 47) speaks for itself.

## I. The Petition Should Be Granted Because the Memorandum Decision of the Arizona Court of Appeals (Decision) If Published Would Change the Law in Arizona, Thereby Denying the Levys the Protection of the Equal Protection Clause of the Fourteenth Amendment.

The cover page of the Decision (App. 1) states: "This decision does not create legal precedent and may not be cited except as authorized by applicable rules." Several holdings of the Decision, had it been published, would create legal precedent, but because it is unpublished, such holdings apply only to the Levys and not to any other litigants in Arizona courts.

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[10] The Court of Appeals did apply a fair and thorough analysis in paragraphs 40-50 (App. 20-25), reversing an award of attorneys' fees denied by the appellate courts, an approach which unfortunately it failed to follow throughout its Decision.

1. In the trial court the Levys requested a change of judge for cause, citing reasons why pro tem Judge Eldridge should be replaced. After their request was denied, they assigned the denial as error in their appeal. Englund's Answer asserted that the only relief available was via special action, the time for which had expired, and criticized the Levys for even raising the issue. The Levys pointed out in their Reply that Englund's contention was frivolous, since the controlling case from the Arizona Supreme Court, *Taliaferro v. Taliaferro,* 921 P.2d 21, 23-24 (Ariz. 1996) specifically exempted challenges for cause from the special action requirement. For some inexplicable reason, the Court of Appeals adopted Englund's erroneous contention, saying, at ¶62 (App. 32), "We see no reason why the same requirement should not apply to attempts to review notices of change of judge for cause,"[11] and refused to review this error, with a cursory rejection (App. 32-33). The rejection constituted part of the reason for the Court of Appeals to sanction the Levys for bringing their appeal (App. 34). This holding establishes new law by overruling *Taliaferro*, but because "the Decision does not create precedent," the new law applies only to the Levys, thereby violating the Levys' equal protection rights under the Fourteenth Amendment.

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[11] Citing an irrelevant case, *Lopez v. Kearney ex rel. County of Pima*, 213 P.3d 282, 283 (2009).

2. The Decision disregarded established law in Arizona that once a judgment is entered, another trial judge may not overrule a decision of the trial judge in the same case (App. 13). The Supreme Court of Arizona in *Lemons v. Superior Court,* 687 P.2d 1257, 1259 (Ariz. 1984) established this principle, which has been followed in subsequent cases, e.g. *Bogard v. Cannon & Wendt Elec. Co., Inc.,* 212 P.3d 17, 25 (2009). Notwithstanding Englund's numerous requests for sanctions throughout this litigation, all such requests were denied prior to the final judgment entered February 2, 2004. Yet the new trial judge (pro tem Judge Eldridge) had no hesitation in signing the Findings (App. 39-58) that Englund's attorney presented to him, leveling sanctions amounting to close to $300,000 in attorneys' fees and associated other charges against the Levys, including a $5000 statutory sanction (App. 57). The Court of Appeals ratified this judgment on grounds that the Levys failed to raise the issue in the trial court (App. 13, ¶27) as to two out of seven rulings, when in fact they did, as they documented in their motion for reconsideration, where they showed the issue was raised in Hearing III and in their Amended Motion for New Trial (App. 78) (In their cross-petition for review in the Arizona Supreme Court, they also cited *Barrio v. San Manuel Div. Hosp., Magma Copper*, 692 P.2d 280, 283 (Ariz. 1984), showing that the supreme court may consider issues not raised in the trial court.) But because the Decision is unpublished and cannot be cited, this result will never see the light of day, and

only the Levys will have been damaged, thereby denying them equal protection of the laws.

3. The Decision created legal precedent in Arizona by awarding Englund attorneys' fees on appeal as sanctions (App. 33-35, ¶¶65-68) against a prevailing party (to the tune of approximately $80,000 (App. 20-25, ¶¶40-50). The Levys could find no authority in Arizona (or anywhere else) for such a holding, but because of the unpublished Decision, it applies only to them, thereby denying them the equal protection of the laws.

4. The Decision disregarded established law in Arizona that a court "may adopt proposed findings that the parties submit, but **only** if those findings are consistent with the ones that it reaches independently after properly considering the facts," *Elliott v. Elliott,* 796 P.2d 930, 936 (1990) (Emphasis supplied) (App. 19, ¶38). Englund's attorney presented the proposed findings of fact, conclusions of law, and judgment, which included sanctions against plaintiffs for alleged abuses, to Judge Eldridge prior to the fee hearing. Judge Eldridge signed the proposed findings verbatim, even with a flagrant typographical error (referring to "plaintiff" instead of defendant) (App. 58)[12] in plain view of where the judge's signature appears. Judge Eldridge's signing off on the award of fees denied by the appellate courts (App. 57,

[12] An error he later had to correct in an amendment to the judgment (App. 60).

paragraph 47) is also evidence of his failure to make an independent determination. Thus the Decision overruled *Elliott*, but only the Levys are subjected to the ruling, thereby denying them equal protection of the laws.

## II. The Petition Should Be Granted Because the Decision Affirmed the Trial Court's Denial of the Levys' Application For a Change of Judge For Cause and Their Amended Motion for New Trial, Thereby Denying Them Due Process Under the Fourteenth Amendment in the Preparation For and Conduct of the Attorneys' Fee Hearing.

"A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133 (1955). "Necessarily included in the right to a fair trial is the right to have the trial presided over by a judge who is completely impartial and free of bias or prejudice," *State v. Neil*, 425 P.2d 842, 844 (1967). By refusing to consider the merits of the Levys' request for change of judge for cause, the Court of Appeals left in place a judge pro tempore who has twice been reversed by the Court of Appeals, who along with counsel for Englund, also a judge pro tempore, has represented the Levys' adversary in court, and whose rulings show bias and favoritism from the moment he took over the case.

As set forth in the Statement of the Case (supra), Judge Eldridge denied the Levys an adequate opportunity to prepare for the hearing (See also Amended Motion for New Trial, (App. 64-69). Moreover, the Decision's affirmation of Judge Eldridge's conduct of the hearing depends primarily on misstatements and omissions of fact (App. 29-31). In ¶58, it was not the Levys who requested that the hearing the following day be held in Silver's office and limited to one-half day; it was Silver, to which the Levys objected and sought to have it in the courtroom on a different day but acquiesced when informed no courtroom was available. And it was the judge who limited it to one-half day (later he further limited it to two hours). In ¶58, it was not until after the Levys had to prematurely end Silver's cross-examination and start their own testimony, based on the time constraint set by Judge Eldridge, that Silver suddenly offered to allow them to finish their testimony in writing. At ¶59 the end of the cross-examination is taken woefully out of context. The Decision ignored the detailed analysis in the Levys' amended motion for new trial (App. 64-69). Judge Eldridge even told Robert Levy that he could accomplish the task of cross-examining Silver with his own testimony or in closing argument instead of cross examination (App. 66, paragraph 2). By allocating a single afternoon of courtroom time for completion of the hearing, he forced the Levys to conduct their part of the hearing in the office of opposing counsel. They were effectively prevented from having their materials with them. The Decision's conclusion at Footnote 11 (App. 30), that " . . . it is not the superior court's fault if the

Levys were unprepared for the second day of the hearing" is erroneous. *It was in fact the superior court's fault*, for failing to provide a courtroom for the Levys. It was abuse of discretion to plan for a single afternoon of courtroom time, particularly since pro tem Judge Eldridge has no courtroom of his own. It was incumbent on the judge to get sufficient courtroom time, especially after denying the Levys' motion to continue. *That was his job.* He also made sure that if the hearing spilled over to the next day, he would again not allow enough time, by not leaving the afternoon free. Judge Eldridge's pro tempore status and his conduct have contributed to the creation of a two-tier system of justice in the Maricopa County Superior Court. Had he been a regular judge of the Superior Court, there would have been no problems with availability of a courtroom, with sufficient time for both sides to present their cases, nor would the judge have been unfamiliar, as Judge Eldridge obviously was and is, with the practice, outlined by Mark Harrison, of protecting unrepresented parties from attack by opposing lawyers. Silver's status as another pro tem judge of the Superior Court also contributes to defeating the purpose of an impartial judicial system. The use of a pro tem judge to facilitate the fleecing of vulnerable individuals in Arizona has recently received media attention in Phoenix.[13] The Levys have been denied due process under the Fourteenth Amendment.

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[13] See articles by Laurie Roberts: *Judge: probate attorneys were justified in taking $473,000 from old lady*, azcentral.com,

(Continued on following page)

## III. The Petition Should Be Granted Because the Decision's Imposition of Sanctions Against the Levys For Filing Their Appeal Constitutes a Violation of Due Process Under the Fourteenth Amendment.

A State is not required to provide a means of appeal to meet the demands of due process, but when it does, it cannot put limitations which are discriminatory, arbitrary, and totally unrelated to any possible State purpose, *Compton v. Naylor*, 392 F.Supp. 575, 578 (N.D.Tex. 1975); *Oppenheimer v. Roth*, 468 F.2d 901, 902 (C.A.Cal. 1972), citing *National Union of Marine Cooks v. Arnold*, 348 U.S. 37 (1954). Imposing sanctions on a prevailing party for filing an appeal amounts to a fine or punishment and constitutes denial of due process.

The Findings which Englund's lawyer presented to Judge Eldridge gave him everything, including attorneys' fees that had been explicitly denied by the appellate courts. The Levys assigned these awards as error, and the Court of Appeals agreed, reversing approximately $80,000 of the award (App. 20-25). Then, it turned around and sanctioned the Levys for having the temerity to appeal (App. 35, ¶68), awarding Englund nearly $20,000 in attorneys' fees as sanctions, (even after Englund failed to timely file his application, App. 38), citing cases that fail to

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March 23, 2010, and *Old Lady goes to federal court (and now she has company)*, The Arizona Republic, January 30, 2010.

support its position (App. 34) but actually support the argument that it is Englund, not the Levys who should have been sanctioned, for making claims which he knew were frivolous (App. 33-35). See *Standage v. Jaburg & Wilk, P.C.*, 866 P.2d 889, 895 (1993). It even gave the lower court a green light to award additional sanctions on remand (App. 36).

Furthermore, in affirming Judge Eldridge's denial of the Levys' amended motion for new trial (App. 2, 35), which awarded additional sanctions of $12,339.48, the appeals court affirmed the additional attorneys' fees awarded to Englund for opposing the Levys' contention that fees denied by appellate courts could not be collected. Thus, the Levys had to pay twice for prevailing, first in the lower court and then in the Court of Appeals. These results constitute denial of due process under the Fourteenth Amendment.

## IV. The Petition Should Be Granted Because the Decision Relied on Numerous Misstatements and Omissions of Material Fact, Turned a Blind Eye to Witness Tampering by Englund's Attorney, and Denied the Levys' Motions to Supplement the Record, to Refer to Other Appeals Court Cases, and For Oral Argument, Thereby Denying Them Due Process Under the Fourteenth Amendment.

1. Paragraphs ¶¶2-22 of the Decision (App. 2-10), the Factual and Procedural History of the case as recited by the Court of Appeals, is replete with

misstatements and omissions of material fact (see Statement of the Case, supra), making the Levys look irresponsible at best and ruining their personal reputations (App. 10, ¶21, see also App. 67, Footnote 2).[14] The Court of Appeals relied on this recitation to affirm the sanctions leveled against the Levys by Judge Eldridge and to impose sanctions of its own on appeal (¶¶66-68). Perhaps the most egregious of these misstatements is the affirmation of Silver's false testimony that Robert Levy said that he would make the case as expensive as possible and thus force Englund into paying the Levys' money to settle the case (see App. 15, ¶31 and App. 17, ¶35; see also paragraph 27 (App. 44) of the trial court's findings of fact). Mr. Levy denied these accusations in his testimony at the fee hearing (App. 75). In fact, that conversation consisted of Silver trying to extort the Levys' case away from them by threatening them with having to pay attorneys' fees if they didn't drop their case and warning that they could not show the jury their evidence that Englund had produced false documentary evidence of dumping manure (Statement of the Case, supra).

2. The Levys pointed out evidence that Englund's attorney Silver engaged in witness tampering in convincing the Levys' witnesses to recant their statements, but the Court of Appeals paid no attention to

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[14] The recited facts are primarily from Silver's testimony (App. 6-9, ¶¶13-18), which he said was offered, not to prove the truth of what he said, only to show his state of mind.

these allegations, implying that it was the Levys who misled their witnesses (App. 18-19, Footnote 4; App. 31-32, ¶61). Examples of this "lawyering" as Silver calls it, are set forth in the affidavits he obtained from Jim Wenger (App. 84-88) to counter the affidavit the Levys obtained (App. 81-83), as discussed in the Levys' Amended Motion for New Trial (App. 75-76). The Wenger affidavits (App. 81-88) speak for themselves. The fact that Silver actually included his two Wenger affidavits in his court filings shows how confident he was that he could get away with anything, including employing the abusive tactics of which he accused the Levys, such as injecting the *Swift* case into the proceedings and then accusing the Levys of doing so. (App. 8, ¶17).

3. After filing their notice of appeal, the Levys filed a motion to allow them to supplement the record on appeal with exhibits that had been returned to them when the underlying case was dismissed. This motion was denied. They filed a motion to permit them to refer to the briefs in the prior appeal *(Levy I)*, which was also denied. They filed a timely application for oral argument which was denied.

These actions by the Court of Appeals contribute to the denial of due process under the Fourteenth Amendment.

## CONCLUSION

The State of Arizona has in effect established a two-tier system of justice, one where the rules are

followed and one which has no rules. The use of pro tem judges in the trial court together with unpublished opinions in the appeals court is a combination with sinister consequences for the administration of justice and public confidence therein that cannot be ignored or glossed over. In this particular case it was used to fleece elderly non-resident property owners, but there are no limits to the damage it can do as long as it remains unchecked. Only this Court can now deal with this important and compelling issue. Accordingly, the Levys respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

ROBERT A. LEVY
PHYLLIS B. LEVY

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**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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|---|---|
| ROBERT A. LEVY and PHYLLIS B. LEVY, husband and wife,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>WILLIAM A. ENGLUND, a single man,<br><br>Defendant-Appellee. | 1 CA-CV 07-0260<br>DEPARTMENT E<br>**MEMORANDUM DECISION**<br>(Filed Jul. 23, 2009)<br>(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County
Cause No. CV 2001-011987
The Honorable Patrick E. Eldridge, Judge
*Pro Tempore*

**AFFIRMED AS MODIFIED, REMANDED**

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Robert A. Levy — El Paso, TX
Phyllis B. Levy
Plaintiffs-Appellants *In Propria Persona*

Polsinelli Shughart, PC — Phoenix
By Leon B. Silver
Rebekah W. Francis
Attorneys for Defendant-Appellee

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**KESSLER**, Judge

¶1 This is an attorneys' fee case. It arises out of the superior court's decision to award $292,240.48 in attorneys' fees, taxable costs, and expenses to William A. Englund ("Englund") pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-341.01(A) (2003), -341.01(C) (2003), -349 (2003), and Arizona Rules of Civil Procedure ("Rules") 11, 26, 37, 56 and 76, including the $5,000 statutory maximum sanction against Robert A. Levy and Phyllis B. Levy (the "Levys") under A.R.S. § 12-349(A). The Levys appeal from the court's judgment awarding such sanctions and its post-judgment order awarding additional sanctions and from its denial of their motions for new trial. For the reasons stated below, we affirm the judgment and post-judgment order as modified, the order denying the motion for new trial and remand for further proceedings consistent with this decision.

## FACTUAL AND PROCEDURAL HISTORY[1]

¶2 The Levys leased a 4.8-acre property known as Lot 9 to Englund on or about August 1, 1994 for $13,250, payable in installments. England also agreed to pay the Levys for the increase in annual property

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[1] This is the second time this case has been before us on direct appeal. In *Levy v. Englund*, 1 CA-CV 04-0161 (memo. dec., Mar. 10, 2005), amended on motion for reconsideration, May 23, 2005 ("*Levy I*"), this Court affirmed the dismissal of the Levys' action, but remanded the case to the superior court for a hearing on the award of attorneys' fees.

taxes from the 1993 amount of $2,100 for tax years 1994-1998. The lease term expired on December 31, 1998.

**¶3** At the end of the lease term, Englund offered to renew the lease and the Levys made a counter-offer. Englund did not respond to the counter-offer. He did mail two checks to the Levys, for $355 and $313.64, which equaled the outstanding balance of $668.64 for the 1998 tax year.

**¶4** After obtaining both checks by February 16, 1999, the Levys realized the amounts equaled the taxes due and did not correspond to the amount of their proposed increased rent payment. Nevertheless, the Levys opted to sue Englund on July 13, 2001, for breach of contract, seeking rent for two and a half years since Englund had sent his last check. The gist of the claim was that Englund had led them to believe that he was continuing to lease the Levys' property.

**¶5** In 1993, Englund also had acquired Lot 10, property zoned as horse property and adjoining Lot 9, from Dennis and Yvonne Hilker. The Hilkers had leased the Levys' land prior to December 1993 and readily admitted that they had dumped horse manure from their horse farm operation there, thinking they could do so by paying the Levys $250 per month. Nevertheless, after the complaint had been dismissed in mandatory arbitration, the Levys filed a second amended complaint against Englund, including their breach of contract action but also alleging property damage against Englund for dumping the manure on

their property (including failing to keep the property in good condition) and causing them to incur removal costs to restore the property. The amended complaint also alleged Englund was estopped from denying he had vacated the property and requested punitive damages. Exhibits disclosed during litigation show the manure piles accumulated on Lot 9 *prior* to Englund's purchase of Lot 10.

**¶6** After delays stemming from the Levys' motions to change various judges, briefing on summary judgment, and other issues, trial was set for November 19, 2003. *See Levy I* at ¶¶ 2-5

**¶7** On the morning of trial, the parties met with the superior court to discuss Mr. Levy's desire to testify in the narrative. The court denied the request and the Levys refused to proceed. *Levy I* at ¶¶ 6-7. Accordingly, the court dismissed the complaint and assessed fees and costs against the Levys on February 2, 2004 of $110,831.05 and $3,011.50, respectively, in addition to $4724.42 in litigation expenses. *Id.* The court later entered several supplemental judgments awarding Englund additional attorneys' fees, costs and litigation expenses, bringing the entire award to $141,035.74.

**¶8** The Levys appealed to this court, arguing that the superior court erred in precluding narrative testimony, denying the Levys their due process rights, granting the motion to dismiss, denying the motion to reconsider, and awarding fees. *Levy I.* We affirmed the court's rulings in all respects, except we vacated

the fee award and remanded for a hearing on the reasonableness of the fee request. *Id.* at ¶ 28. We also vacated the supplemental awards and remanded to the superior court for a hearing.

**¶9** On remand, Englund submitted an application for an award of $236,068.75 in attorneys' and paralegal fees, $5,146.50 in computer-related research costs and clerk costs, and $12,729.30 in litigation expenses.[2] Englund explained that the application was for fees incurred during the entire litigation, including the proceedings before this Court and the Arizona Supreme Court.

**¶10** The superior court held a two-day hearing on the reasonableness of the fee request. It heard testimony from Englund's original counsel, Barbara Ross ("Ross"); his current counsel, Leon Silver ("Silver"); and defense expert Mark Harrison ("Harrison").

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[2] After *Levy I* was decided, the Levys unsuccessfully moved to have their supersedeas and cash bonds exonerated in the superior court. Given the upcoming hearing on the application for fees and costs, the court denied that motion without prejudice. After the court awarded Englund's application for attorneys' fees, costs and litigation expenses, the court released the bond funds to Englund in payment of the award on remand over the Levys' protest. The Levys filed a special action petition in this Court challenging the superior court's refusal to release the bonds to them and refusal to automatically change the judge assigned to the case on remand. We accepted jurisdiction of the latter issue but denied relief and declined jurisdiction of the former issue. *Levy v. Swann,* 1 CA-SA 06-0159 (August 31 and December 7, 2006 orders).

**¶11** Ross testified that she billed for services at $175 per hour, the low end of the spectrum and tried to keep her billing tight. Ross testified that, from the beginning, Mr. Levy would refuse to accept discovery responses and would not comply with the arbitrator's rulings.

**¶12** Silver, who succeeded Ross as Englund's counsel, testified that he had been in practice for seventeen years and had typically billed at the rate of $250 to $350 per hour. He reduced the fee for this case to $225 per hour until 2003, and then billed Englund at $250 per hour when his regular billing rate rose to $300 per hour. Silver tried to contain the expense by using an associate, Greg Stanton, for the early litigation and a paralegal. Silver's usual rate rose to $350 per hour when he joined Robbins & Green in August 2005, but he kept Englund's rate at $300 per hour. Englund has paid all the bills except for the Robbins & Green bill and expenses accruing for the current representation now that Silver is at a new firm. However, those additional billings are still owed by Englund and he is obligated to pay those bills.

**¶13** During his testimony, Silver explained the tortuous path of this litigation. He emphasized admissions by the Levys that they knew Englund's checks were for taxes, not for rent, and yet pursued the litigation, facts undisputed in the joint pretrial statement. Silver cited this evidence as an example of the Levys' litigation behavior and their "refusing to face the facts, refusing to give up claims even in the

face of their own admission that the facts were otherwise." This phenomenon also was evidenced by their refusal to accept (1) Mrs. Hilker's declaration that the Hilkers believed they were free to dump manure, and (2) photos indicating that the debris built up on the Levys' property before Englund ever leased it. Silver thus had to spend significant time cross-examining Mr. Levy on the waste issue, and his outline on the subject was fifty-one pages long.

**¶14** Silver further testified that it became apparent that the Levys were setting Englund up for suit from the beginning. For example, they wrote Englund a letter stating that if they heard nothing further from him they would assume that Englund was continuing to lease the property. Silver also pointed out that the Levys filed suit one month after Englund's daughter complained to the City of Phoenix that the Levys' property was "horribly overgrown with weeds." Silver testified that the Levys sued in part to retaliate for this complaint. Gathering evidence to establish these purposes also contributed to trial preparation costs.

**¶15** The Levys' litigation tactics also forced Silver to engage in irrelevant discovery. Although a claim of holdover allowing for recovery of rent was specified in the lease, the Levys made a claim for the fair value rental of the property. They disclosed Brent Boles ("Boles") as an expert, along with his opinion as to the value of the property. During his deposition, Boles told Silver that the document was not his opinion, he was not qualified to give that opinion, and that he

was afraid that the Levys would sue him if he failed to cooperate.

**¶16** The bad faith claim also required Silver to incur significant fees. During a deposition, Levy stated he would be happy with a jury award of $1 million in bad faith damages. Silver consequently believed that he was litigating a $1 million case, not a $30,000 case and that Levy would re-raise the bad faith claim. Silver believed that the Levys had committed perjury and fraudulently obtained evidence to oppose summary judgment, and thus devoted additional time to analyzing and proving these theories. Silver also came to believe that the Levys noticed a change of judge when trial was imminent in order to needlessly delay the case.

**¶17** Silver also detailed how the Levys injected their unrelated case against Swift Transportation Co. ("Swift Transportation") into discovery and voir dire proceedings. Silver conducted due diligence to ascertain why the Levys had implicated that company and its Chief Executive Officer, Jerry Moyes ("Moyes"). The Levys sought to explore alleged involvement by Englund in a conspiracy between Swift Transportation, Moyes, and the CIA, along with Englund's alleged relationship with former Maricopa County Assessor Kevin Ross. As shown by exhibits at the fee hearing, the Levys had unsuccessfully sued Swift and the CIA in federal court alleging a conspiracy arising from a car accident between Levy and a Swift Transportation truck. Levy apparently alleged the accident was related to CIA drug activities with

Swift. Meanwhile, the Levys were seeking to change judges in this case, obtained a new round of discovery, and claimed that Silver and a witness were conspiring against them, as were Englund and the Hilkers.

**¶18** Silver also pointed out that Englund repeatedly attempted to settle with the Levys, offering to forego any fee claim against the Levys if they would desist. This unsuccessful effort continued even after Englund had incurred substantial fees.

**¶19** Expert witness Harrison, a 46-year lawyer with experience in about 400 cases involving professional discipline, also testified in support of the award's reasonableness. Harrison's review of the records indicated that the Levys had initiated sixty-seven actions in this case, necessitating a response, while Englund had initiated about eighteen. About nine of those occasions were efforts to seek reconsideration, to which Englund did not respond formally. Nonetheless, his counsel had to review those motions and incur attorneys' fees. Harrison opined that a great many of the actions undertaken by the plaintiffs were "superfluous or duplicative or unnecessary." Nevertheless, Englund's attorneys were required to respond or risk default on the issues.

**¶20** In undertaking his review, Harrison evaluated the time Englund's attorneys had spent on various activities and pleadings, and found nothing out of line. Harrison concluded that the fees Englund had incurred were reasonable.

**¶21** The Levys introduced no contrary evidence except for a narrative statement by Mr. Levy. Many of Mr. Levy's questions amounted to asking the witness to reiterate prior testimony. He also used part of his time to tell jokes, argue irrelevant points, and inquire whether lawyers believe it is acceptable to "shoot at" *pro se* litigants.

**¶22** The superior court granted Englund's application for attorneys' fees and costs after making extensive findings of fact and conclusions of law. It found that the award was justified under A.R.S. §§ 12-341.01(A), (C) and 12-349, and Rules 11, 26, 37 and 76(f). The court granted Englund $253,265 in attorneys' fees, $5,000 in A.R.S. § 12-349 damages, taxable costs of $1,825, and nontaxable litigation expenses of $19,811. It later denied the Levys' motions for new trial, and awarded Englund an additional $12,339.48 in attorneys' fees, costs, and expenses to compensate him for responding to the motions. The Levys appeal from the initial award on remand, the supplemental award and the denial of their new trial motions.

## DISCUSSION

### I. The Award of Attorneys' Fees, Costs and Penalty

**¶23** The Levy's argue that the award of attorneys' fees, costs and penalty was both legally erroneous and not supported by the evidence. Specifically, they contend: (1) The superior court could not award fees

and costs as a matter of law because previous judges had denied requests for fees and because the only evidence submitted was hearsay; (2) The award was factually erroneous because the findings of fact and conclusions of law entered by the court were those submitted by Englund and the Levys had filed objections to those findings showing they were not supported by the evidence; (3) There was no statutory basis for an award under A.R.S. § 12-341.01(A) because the matter did not arise out of contract and an award of fees would be a substantial hardship to the Levys or under Rule 76(f) because and there had to be a trial de novo from the arbitration; (4) The appellate courts had already denied Englund's fees in *Levy I* and *Levy v. Swann;* (5) The mandate in *Levy I* was limited to holding a hearing on the first awards of fees and costs prior to remand and precluded a supplemental award of fees and costs incurred for responding to the motions for new trial; (5) The fees were inflated and a result of block-billing and double billing; and (6) The court denied the Levys an adequate opportunity to prepare for and conduct the evidentiary hearing and erroneously denied their motion for new trial related to that issue.

**¶24** Since the superior court held that the award of fees and costs was justified under various statutes and rules, we will affirm if that holding is correct under any one statute or rule, without having to discuss other bases for the holding. We review *de novo* the superior court's determination whether a statute awarding fees applies, but review the amount

of the award under the abuse of discretion standard. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12, 6 P.3d 315, 318 (App. 2000) (citation omitted). We hesitate to second-guess the trial court on the amount of such fees "in view of the [trial court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (App. 1994) (*quoting Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985)). Because the trial court supported its ruling with findings of fact and conclusions of law, we review the factual findings for clear error and apply *de novo* review to its conclusions of law. *See* Rule 52(a); *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9, 156 P.3d 1149, 1152 (App. 2007).

**¶25** Applying this standard, we find that the award of fees was not erroneous under A.R.S. §§ 12-341(C), -349, and -350 and do not discuss the other rules or statutes upon which the superior court relied upon except as discussed in relation to the award of fees for any appellate aspects of this litigation. To the extent that the award included amounts for any appeal, we direct the trial court to modify the judgment and post-judgment order awarding attorneys' fees and costs by reducing them by $79,759.39, but increasing them by any fees and costs we award on appeal.

### A. Legal Bar to the Award

**¶26** The Levys argue that because other judges had issued interlocutory decisions and had not awarded attorneys' fees to Englund, the superior court was barred from now awarding such fees. In essence, the Levys contend that such an award is barred under the horizontal appeal rule. That rule discourages judges assigned to a case from revisiting rulings by previously assigned judges unless the prior ruling was manifestly erroneous or there had been a substantial change in essential facts, issues, evidence or the applicable law. *Lemons v. Super. Ct.,* 141 Ariz. 502, 504, 687 P.2d 1257, 1259 (1984); *Donlann v. Macgurn,* 203 Ariz. 380, 385-86, ¶ 29, 55 P.3d 74, 79-80 (App. 2002). This is not a matter of jurisdiction but merely wise judicial policy. *Lemons,* 141 Ariz. at 504, 687 P.2d at 1259.

**¶27** We disagree with the Levys for several reasons. First, the Levys never raised this issue in the superior court as to A.R.S. §§ 12-341.01(C) or -349. They only raised this issue as to interlocutory rulings on summary judgment or discovery under Rules 11, 26, 26.1, 37 and 56. Generally we will not exercise our discretion to consider arguments made for the first time on appeal. *McDowell Mtn. Ranch Land Coal. v. Vizcaino,* 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997). Contrary to the Levys' argument, the issue of whether a court should reconsider another judge's decision in the case is not a matter of subject matter jurisdiction. *Lemons,* 141 Ariz. at 504, 687 P.2d at

1259. We see no reason to exercise our discretion to consider this argument in this case.

**¶28** Second, we cannot agree with the Levys that there were no changed circumstances. When the superior court issued various interlocutory orders, any decision as to whether Englund would be entitled to fees under A.R.S. §§ 12-341.01(C) or -349 had to wait for the final decision in the matter. Thus, changed circumstances would justify the superior court rendering such an award in this case at the end of the litigation.

**¶29** The Levys also argue that the award was not legally justified because the only evidence presented in support of the fee application was hearsay by Mr. Silver. This argument is not supported by the record. A hearsay statement is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Here, Silver testified in court and was subject to cross-examination. Even if the statements qualify as hearsay, an exception to the hearsay rule allows testimony demonstrating the declarant's state of mind. Ariz. R. Evid. 803(3). Silver's statements about what factors influenced his judgment and dictated his litigation efforts are not inadmissible hearsay. *See Public Serv. Co. of Oklahoma v. Bleak,* 134 Ariz. 311, 320-21, 656 P.2d 600, 609-610 (1982). Such evidence is relevant to prove the reasonableness of the conduct of the person receiving the communication. *See id.* at 321, 656 P.2d at 610.

**¶30** Additionally, the record shows the Levys waived any objection to Silver's testimony on hearsay grounds. Silver did not state that his testimony was hearsay, only that the third party declarations he used to support the application would not be used to show the truth of the matter, but what "it was that we were learning that resulted in us doing what might look like a lot of work given the nature of the case." The Levys never objected to Silver's testimony at the hearing as hearsay.

**¶31** Furthermore, other evidence apart from Silver's testimony sustains the sanctions. The court also relied upon Harrison's testimony that attributed Silver's amount of time to the Levys' excessive number of baseless motions. Mr. Levy himself made an admission, admissible under Arizona R. Evid. 801(d)(2)(A), that he was trying to run up fees to force Englund to pay.

### B. The Evidence Supported the Basis for the Award

**¶32** The Levy's contend that as shown in their objections to the proposed findings of fact and conclusions of law, the evidence did not support the award and those findings and conclusions are not entitled to any deference because the court simply signed the proposed findings submitted by Englund. We disagree.

**¶33** First, the record supports the superior court's findings for the basis of the award. The court found

that the attorneys' fees, costs, and expenses claimed by Englund were reasonable under the circumstances. It found that the work performed by Englund's attorneys was caused by the Levys' own misconduct:

> the vast majority of the work billed was billed as a result of the tactics employed by the Plaintiffs, including but not limited to raising issues and claims without legal or factual justification, making claims that they knew were false, re-raising issues that had been previously decided, and engaging in or attempting to engage in obstructionist or "hide-the-ball" litigation behavior with regard to the filing of joint documents like pretrial statements and in the submission of exhibits.

**¶34** In reviewing findings of fact, we view the evidence in the light most favorably to support the findings and will uphold the findings if there is any reasonable evidence supporting them. *Mitchell v. Mitchell,* 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987). We are bound by the findings unless they are clearly erroneous, giving due regard to the opportunity of the trial judge to view the evidence and weigh credibility. *Lee Dev. Co. v. Papp,* 166 Ariz. 471, 475-76, 803 P.2d 464, 468-69 (App. 1990). While the Levys contend that the clearly erroneous standard does not apply if findings are induced by an erroneous view of the law, he provides no argument on that theory and we disregard it. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.* 207 Ariz. 95, 122, ¶ 117, 83 P.3d 573, 600 (App. 2004).

**¶35** The record supports the findings. Silver, Ross, and Harrison all testified regarding the need to incur fees to respond to dozens of filings the Levys had initiated. The superior court also specifically found and the record supported that Mr. Levy had told Englund's counsel that he would make this case take as long as possible and be as expensive as possible in order to force Englund to settle the claim and pay the Levys some amount of money. The record indicates that the Levys knowingly asserted claims lacking any basis, re-raised issues already decided, and abused discovery. Englund was obligated to respond to these arguments.

**¶36** Given this record, the award was justified under A.R.S. §§ 12-341.01(C) and -349.[3] Section 12-341.01(C) applies when clear and convincing evidence establishes that a claim or defense (1) constitutes harassment, (2) is groundless, and (3) is not made in good faith. A.R.S. § 12-341.01(C). Good faith and intent to harass are judged by the subjective

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[3] As to the award of fees under A.R.S. § 12-349, the court does not appear to have made express holdings under A.R.S. § 12-350. Nevertheless, some of its holdings appear to correspond to certain factors in A.R.S. § 12-350. The court found that the Levys' claims were not grounded in fact or based upon a good faith belief formed after a reasonable investigation and the Levys unnecessarily increased the cost of the litigation and intended to harass Englund. Those correspond to A.R.S. § 12-350(1), (2), (5) and (6). It also found no circumstances making the award unjust. *See* A.R.S. § 12-350(4). Similarly, the record was undisputed the Levys did not prevail on any claims. *See* A.R.S. § 12-350(7).

standard, while groundlessness requires application of an objective standard. *Gilbert v. Bd. of Med. Exam'rs,* 155 Ariz. 169, 180, 745 P.2d 617, 628 (App. 1987), *superceded by statute on other grounds as stated in Goodman v. Samaritan Health Sys.,* 195 Ariz. 502, 508 n.7, ¶ 25, 990 P.2d 1061, 1067 n.7 (App. 1999).

**¶37** With respect to the findings, the Levys also seem to argue that the superior court committed clear error in not accepting their affidavits and ruling in their favor. Such an argument does not render the findings clearly erroneous. Because the court is in a superior position to judge witness credibility and make reasonableness determinations, we defer to its findings. *See Chase Bank,* 179 Ariz. at 574, 880 P.2d at 1120; *Lee Dev. Co.,* 166 Ariz. at 475-76, 803 P.2d at 468-69. Since there is evidence supporting the findings, we affirm. *Mitchell,* 152 Ariz. at 323, 732 P.2d at 214.[4]

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[4] The Levys' attacks on specific findings fare no better. Finding No. 30 simply restates the Levys' belief that a conspiracy exists between the superior court, Silver and others. They complain that the finding should be overturned because their conspiracy claims are warranted. There can be no doubt that pursuing these theories increased the fees incurred in this case. The Levys' argument is not relevant and does not demonstrate clear error.

Finding No. 31 lists the misrepresentations concerning witness testimony and the circumstances under which the Levys obtained testimony. The record confirms that witnesses recanted and clarified that they had no knowledge of the events or did not

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¶38 The Levys also argue the findings are not entitled to any deference because they were prepared by Englund's counsel and approved by the superior court. We disagree. Findings prepared by the prevailing party's counsel "are not to be rejected out-of-hand" if they are supported by evidence. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964). The findings are supported by the evidence here.[5] *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990), does not support the Levys' argument that we cannot rely on proposed findings of fact approved by the court. It only held that a court must exercise its independent judgment in making findings. There is no evidence the superior court failed to meet that standard.

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support the Levys' versions of events. The superior court did not clearly err in making these findings. There is no doubt that the Levys' failure to be candid with the witnesses and opposing counsel drove up the cost of Englund's defense.

Finally, the Levys claim that the superior court erroneously determined in Finding No. 33 that Mrs. Levy committed perjury. They misunderstand the finding. It provides that Silver testified that he was prepared to demonstrate that Mrs. Levy had perjured herself with respect to the foundation for a photograph used to oppose summary judgment. Therefore, we cannot say that the finding is clearly erroneous.

[5] The Levys also contend that their objections to the proposed findings refute them. In fact, most of those objections are simply alternative findings and conclusions. Some are simply based on a conflict in the record which the superior court resolved in England's favor.

**¶39** We agree with the superior court's conclusion that this suit was groundless, harassing, and brought in bad faith because the Levys had no reason to believe that Englund had held over on the lease or was responsible for the manure accumulations. When Englund would not accede to the Levys' demands, they filed suit with the purposes of forcing him to pay amounts he did not owe and of injuring him financially. Substantial evidence, including statements by Mr. Levy, indicated that the Levys sought to prolong the litigation in bad faith and for the purpose of harassing Englund into paying. The groundless nature of the Levys' claims is underscored by their pursuit of far-fetched conspiracy theories at Englund's expense.

### C. Fees Incurred in the Appellate Courts

**¶40** Englund requested an award including all his attorneys' time and costs incurred in *Levy I* and *Levy v. Swann*. The superior court granted almost all of the fees, costs and expenses requested by Englund, so we assume that included the appellate fees and costs. The Levys claim that those fees were not awardable because they had already been denied by the appellate courts. This requires us to review each of the holdings in the appellate matters filed by the Levys.

**¶41** In *Levy I*, Englund requested an award of attorneys' fees under A.R.S. § 12-341.01(A) in his answering brief. This Court denied Englund's request

for fees in denying his motion for reconsideration. Our supreme court issued two orders in *Levy I* denying Englund's request for an award of attorneys' fees on the petition for review.

**¶42** *In Levy v. Swann,* we denied Englund's request for attorneys' fees in the special action with prejudice to the extent the request was based on the special action being frivolous, not brought in good faith and constituted harassment. However, we denied the request without prejudice to the extent on remand the superior court determined the action arose out of contract. We also awarded Englund $285 in taxable costs. In a petition for review of that case, our supreme court denied the petition, but did not address attorneys' fees.

**¶43** Based on this record, the superior court erred in awarding Englund attorneys' fees related to *Levy I* because both this Court and the Arizona Supreme Court denied Englund fees in that action.

**¶44** As to *Levy v. Swann,* we indicated Englund could request the fees on appeal on remand if he could show the matter arose out of contract.[6] We hold that the action did not arise out of contract for purposes of an award of attorneys' fees.

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[6] The supreme court did not address any request for fees on the petition for review from the special action. Accordingly, any such request was deemed denied as a matter of law. *State v. Hill,* 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) (motion not ruled on is deemed denied by operation of law).

**¶45** The application of A.R.S. § 12-341.01(A) to Englund's claim is a question of statutory interpretation that we review *de novo. Hampton v. Glendale Union High Sch. Dist.,* 172 Ariz. 431, 433, 837 P.2d 1166, 1168 (App. 1992). Section 12-341.01(A) grants courts the discretion to award reasonable attorneys' fees to the successful party in a contested action arising out of an express or implied contract.

**¶46** At least two of the amended complaint claims, estoppel and property damage, do not appear to have a contractual basis. This court has held that even a promissory estoppel claim is an equitable remedy and not a theory of contract liability. *See Double AA Builders, Ltd. v. Grand State Constr., L.L.C.,* 210 Ariz. 503, 511-12, ¶¶ 43-48, 114 P.3d 835, 843-44 (App. 2005). Moreover, the property damage claim with accompanying punitive damages request appears to sound in tort. The mere presence of a contract in the underlying transaction does not mean that these non-contract claims arise out of contract. *See Robert E. Mann Constr. Co. v. Liebert Corp.,* 204 Ariz. 129, 134, ¶ 16, 60 P.3d 708, 713 (App. 2003). *See also Marcus v. Fox,* 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986) (to award attorneys' fees for torts in an action involving a contract, the tort must not exist but for the breach of contract).

**¶47** The Levys did assert a "breach of contract" claim for their first count and requested an award of attorneys' fees under A.R.S. § 12-341.01(A). However,

this court looks to the substance of the claim and not its label, examining the nature of the action and the surrounding circumstances to determine whether the claim is one arising out of a contract. *Marcus,* 150 Ariz. at 335, 723 P.2d at 684 (citation omitted).

**¶48** In essence, the Levys sought holdover rent based upon Englund's alleged failure to vacate the premises. A.R.S. § 33-342 (2007) supplies the basis for a claim of "holdover" rent in Arizona:

> When a lessee holds over and retains possession after expiration of the term of the lease without express contract with the owner, the holding over shall not operate to renew the lease for the term of the former lease, but thereafter the tenancy is from month to month.

When a claim arises out of statute, fees are not recoverable under A.R.S. § 12-341.01(A). *See Kennedy v. Linda Brock Auto. Plaza, Inc.,* 175 Ariz. 323, 325-26, 856 P.2d 1201, 1203-04 (App. 1993) (when a cause of action is purely statutory, A.R.S. § 12-341.01(A) does not apply and therefore a statutory lemon law action did not arise out of contract even though a lease helped form the basis of the dispute). *Cf. Keystone Floor & More, LLC v. Arizona Registrar of Contractors,* 1 CA-CV 07-0900, 2009 WL 2044422, at *3, ¶ 12 (Ariz. App., July 15, 2009) (appeal arising out of contractors' failure to comply with statutory duties

did not arise out of contract despite failure was related to contract performance).[7]

**¶49** No Arizona case squarely addresses whether fees are recoverable under A.R.S. § 12-341.01(A) for litigating a holdover rent claim.[8] Because the statute creates the right to recover rent and the duty breached is imposed by statute, we conclude that the claim arises out of statute, not contract. As Division Two of this court held in *Pima County v. Testin,* only an express contract concerning holdover renders the statute inapplicable. 173 Ariz. 117, 119, 840 P.2d 293, 295 (App. 1992). In this case, the statute controls. The mere existence of the prior lease agreement does not warrant a contrary conclusion.

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[7] While the Levys did not raise this statute on appeal, we are not bound by the parties' arguments if an issue of statutory application is involved and if their arguments will reach an incorrect result on the statutory issue. *Maximov v. Maximov,* 220 Ariz. 299, 301 n.4, 205 P.3d 1146, 1148 n.4 (App. 2009).

[8] In *Berry v. Arizona State Land Dep't,* the Arizona Supreme Court affirmed the superior court's determination that a state land commissioner had no authority to order holdover rent for unlawful possession of state lands. 133 Ariz. 325, 327, 651 P.2d 853, 855 (1982). With respect to attorneys' fees claimed under A.R.S. § 12-341.01(A) and other statutes, the court affirmed the trial court's discretionary decision not to award fees, stating: "We need not reach the arguments presented by the parties on the question of whether the State, when represented by the Attorney General, is entitled to attorneys' fees." *Id.* at 328, 651 P.2d 853, 651 P.2d at 856. The superior court had found that even if the statute applied, it would exercise its discretion to deny fees. *Id.*

**¶50** We thus hold that the superior court erred in awarding Englund attorneys' fees for *Levy I* and *Levy v. Swann*. Englund requested an award of fees and costs related to these two actions totaling $79,759.39. On appeal, we may remand the matter with directions to enter such judgment as should have been entered. A.R.S. § 12-2103(A) (2003); *Acuna v. Kroack*, 212 Ariz. 104, 115, ¶ 42 n.15, 128 P.3d 221, 232 n.15 (App. 2006) (section 12-2103(A) applies to court of appeals). Accordingly, we direct that on remand, the superior court shall enter a revised judgment awarding the entire amount of attorneys' fees, expenses, and costs as it did below after the first remand, but shall reduce that total amount by $79,759.39, and increase that amount by any award of attorneys' fees, expenses and costs we award on appeal.

### D. The Award Exceeded the Mandate

**¶51** The Levys contend that the superior court was limited by our mandate in *Levy I* to hold a hearing on and consider awarding only the attorneys' fees and costs contained in the judgments vacated by that appeal and could not include any additional fees or costs relating to the proceedings on remand.[9] We disagree.

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[9] In the original judgment awarding attorneys' fees, expenses and costs, as supplemented by the supplemental and second and third supplemental judgments, which were vacated

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**¶52** Englund had requested attorneys' fees and costs at every stage of the proceeding. Furthermore, Englund had provided the Levys with updates on fees incurred in its first supplemental disclosure statement on October 13, 2006. The Levys had an opportunity to object to such fees at the two-day hearing.

**¶53** Nothing in our previous orders or decision in *Levy I* precluded the superior court from awarding fees and expenses beyond the judgment we vacated in *Levy I*. In *Levy I*, we "vacate[d] the award of attorneys' fees and all related costs and expenses and remand[ed] for a hearing *on those issues.*" *Levy I* at ¶ 28 (emphasis supplied). In referring to "those issues," we did not preclude Englund from increasing his fee request to include all attorneys' fees, costs and litigation expenses incurred prior to remand. Nor did our order of August 26, 2005 in *Levy I*, vacating the second and third supplemental judgments, change that result. We entered that order by stipulation and stated that by vacating the supplemental judgments, we were "remanding the matters encompassed by

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in *Levy I*, the superior court awarded $141,035.74. On remand, the court entered a total award of $292,240.48, including the judgment on remand and the supplemental award. As noted supra, ¶ 50, the latest judgment award has to be reduced by $79,759.39. Accordingly, the modified judgment on remand (subject to the award of fees and costs on appeal) will be $212,481.09. Thus, the difference between the total amount which was vacated in *Levy I* and the modified judgment prior to any award of fees and costs on appeal is $71,445.35 ($212,481.09-$141,035.74).

those judgments for determination by the trial court at the hearing to be held on the issues encompassed in our Memorandum Decision. . . ." Thus, the August 26 order merely ensured that the supplemental judgments were vacated so they could be considered along with all other fees and costs requested by Englund. For this same reason, the mandate in *Levy I* did not preclude the superior court from awarding Englund attorneys' fees and costs incurred after remand.

**¶54** Moreover, contrary to the Levys' arguments, the supplemental fee request on remand was not untimely. The judgment authorized Englund to apply for additional fees and provided for amendments to that judgment to reflect fees and costs associated with post-judgment proceedings. Englund filed the First Supplemental Declaration and request for additional attorneys' fees ten days after the trial court denied the amended new trial motion in a signed order. Contrary to the Levys' assertions, Englund's fee requests are not time-barred. The time constraints of Rule 54(g) do not apply to attorneys' fees and expenses sought as sanctions pursuant to statute or rule. *See* Rule 54(g)(4). Moreover, the judgment contained language pursuant to Rule 54(b), which would also permit later filings of fee requests.

### E. The Fees Awarded Are Not Excessive

**¶55** The superior court found that the attorneys' fees, costs, and expenses claimed by Englund were

reasonable under the circumstances. It also found that the rates charged by the lawyers, paralegals, clerks, and expert witness Harrison were appropriate for the legal community and reasonable.

**¶56** We give deference to the superior court's findings as to the amount of fees and costs and will not reverse unless there is an abuse of discretion, that is, either that there is no evidence supporting the findings or the reasons given clearly are untenable, legally incorrect or the award amounts to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 (App. 2006). The record supports the court's findings and conclusions. Silver, Ross, and Harrison all testified regarding the need to incur fees to respond to dozens of filings the Levys had initiated in this litigation which has been unfounded from its inception. The record contains no support for the Levys' assertions that the hourly rates were inflated, the time spent was unreasonable or the billing improper.[10]

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[10] The Levys do make one argument which deserves mention-that of block-billing. The Levys contend that the exhibit detailing the time and fees spent by Englund's attorneys contain block-billing, meaning a single time entry summarizing numerous things done without allocating the time within the block per activity. The Levys argue that block-billing does not permit a court to accurately analyze the reasonableness of the fees. However, Harrison testified that block-billing in this case was fair because it would have been difficult to separate out every activity and allocate a specific time to it. The specificity of the time and activities need only be sufficient to allow a neutral

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### F. The Levys' Due Process Arguments Are Meritless

**¶57** The Levys contend the fee award should be reversed because the superior court denied them due process in not permitting them time to prepare for the fee hearing and in conducting the hearing. They also contend that the court erred in denying their motions for new trial on these issues. We will sustain the denial of a motion for new trial absent a clear abuse of discretion. *Erickson v. Waller,* 116 Ariz. 476, 479, 569 P.2d 1374, 1377 (App. 1977). We review a court's decisions to control its own calendar for an abuse of discretion. *State v. Harris,* 152 Ariz. 150, 152, 730 P.2d 859, 861 (App. 1986). We reject the arguments that the Levys did not receive due process.

**¶58** The Levys raise a host of objections to the two-day reasonableness hearing in November 2006. At the conclusion of the first day, Mr. Levy wanted to continue the hearing the following day, but no courtroom was available. At their request, the superior court agreed to hold the hearing in Silver's office and limit it to one-half day. The Levys are not entitled to

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judge to make a fair evaluation of the time expended and the need and reasonableness of that time and effort. *Metro Data Sys., Inc. v. Durango Sys., Inc.,* 597 F. Supp. 244, 245 (D. Ariz. 1984). We have reviewed the details of Englund's lawyers' time and activities supporting the application and do not find it abusive. The vast majority of the time entries and description of activities are not block-billed and many of those that were so billed involved trial preparation time which could not be allocated.

complain on appeal about the very arrangements Mr. Levy had requested. *State v. Logan,* 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001).[11] Similarly, while the Levys complain that the time for the second day was only two hours, to accommodate the Levys, the superior court permitted them to submit narrative testimony in support of their case. They agreed to such narrative testimony and cannot now argue that was reversible error. *Id.* They also received a week to prepare their submission. The Levys submitted the response. We are satisfied on this record that the two-day procedure provided procedural due process to the Levys.

**¶159** The Levys further complain that their cross-examination of Silver was prematurely terminated and they were not given sufficient time for the hearing. The record reflects, however, that the Levys' terminated this examination:

MR. LEVY: [TO MRS. LEVY] Is there anything else you wanted to ask?

MRS. LEVY: No.

MR. LEVY: Okay. I think we're finished.

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[11] The Levys complain that they had to park a distance from opposing counsel's office and thus could not bring their materials with them to the November 8, 2006 hearing. They fail to identify what they could not bring. There is no indication in the record that they requested help in transporting the materials. In any event, it is not the superior court's fault if the Levys were unprepared for the second day of the hearing.

The Levys had sufficient time to present their case. Nor have they shown how the length of the hearing prejudiced them. We will reverse only when alleged error prejudiced the parties. *Bowling v. Stapley,* 1 CA-CV 07-0745, 2009 WL 1014587, at *13 ¶ 52 (Ariz. App., Apr. 16, 2009); Rule 61.

**¶60** Finally, the Levys complain that the superior court refused to grant their motion to compel production of Silver's tax filings, Silver's compensation earned as a pro tem judge, and billing information regarding Silver's other clients. They attach to the appendices to their opening brief various document requests which they allegedly had made for that information. However, those requests are not part of the record on appeal and we will not consider them. *Melgar v. Campo,* 215 Ariz. 605, 609 n.8, 161 P.3d 1269, 1273 n.8 (App. 2007); *Lansford v. Harris,* 174 Ariz. 413, 417 n.1, 850 P.2d 126, 130 n.1 (App. 1992). Moreover, we do not see how the failure to obtain that information in any way prejudiced the Levys in preparing for the fee hearing.

## II. The Levys' Other Issues Are Not Properly Before This Court

**¶61** The Levys raise several other claims which are not properly before this Court. First, they assert that the superior court abused its discretion in not sanctioning Englund for witness tampering. The issue presented was whether certain witnesses were misled by the Levys in rendering opinions for trial

which they later recanted in sworn declarations. The Levys presented no facts to support an allegation that Silver did anything untoward with these witnesses.

**¶62** Second, the Levys complain that Judge Baca denied their request for a change of judge pursuant to Rule 42(f)(2). This issue had to be addressed by a special action. Review of denials of peremptory requests for changes of judge must be reviewed by special action. *See Taliaferro v. Taliaferro,* 186 Ariz. 221, 223-24, 921 P.2d 21, 23-24 (1996). We see no reason why the same requirement should not apply to attempts to review notices of changes of judge for cause. *See Lopez v. Kearney ex rel. County of Pima,* 2 CA-SA 2009-0024, 2009 WL 1874272, at *1, ¶ 1 (Ariz. App., June 30, 2009) (accepting special action jurisdiction on change of judge request for cause in criminal proceeding). The time for filing a special action has expired. Relief is not available in this appeal.

**¶63** Third, the Levys complain that the proceedings were compromised because: (1) Judge Eldridge was a *pro tem* judge and not a "regular" judge, and (2) Silver also serves as a *pro tem* judge. Again, if they wanted to seek a change of judge on the basis of bias, they should have filed a petition for special action, which they failed to do. Moreover, none of the Levys' authorities support the proposition that a *pro tem* judge cannot advocate before another *pro tem* judge. *See Kay S. v. Mark S.,* 213 Ariz. 373, 377-81, ¶¶ 22-38, 142 P.3d 249, 253-257 (App. 2006) (finding an appearance of impropriety when the advocate worked

as a judge *pro tem* for the judge hearing the case and the judge's staff identified the attorney as their favorite judge *pro tem*); *State v. Salazar,* 182 Ariz. 604, 607-09, 898 P.2d 982, 985-87 (App. 1995) (finding disqualification warranted when one of the attorneys in the case undertook representation of the trial judge's former secretary in a wrongful termination action against the judge).

**¶64** Finally, the Levys complain that the supersedeas bond did not remain in place during this appeal and they will be damaged if they prevail on appeal. This issue is moot because the Levys have not prevailed on appeal and even if there was error in the payment of the bond proceeds to Englund, we cannot offer any remedy for such error. *Vinson v. Marton & Assoc.,* 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). On remand, the superior court may determine if the Levys are entitled to reimbursement from Englund for any amounts released to Englund based on our modification of the judgment.

## III. Attorneys' Fees on Appeal

**¶65** Englund requests attorneys' fees and costs on appeal pursuant to all of the statues and rules cited by the superior court and to sanction the Levys pursuant to Arizona Rule Civil Appellate Procedure 25 on the grounds the appeal was frivolous. The Levys have not responded to that request in their reply brief.

**¶166** We conclude that Englund is entitled to attorneys' fees on appeal pursuant to A.R.S. § 12-349(a)(1), (3) and Arizona Rule of Civil Appellate Procedure ("Ariz. R. Civ. App. P.") 25. In *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230-31, 866 P.2d 889, 898-99 (App. 1993), this Court awarded sanctions under § 12-349(a) finding that the appeal was spurious and taken without substantial justification. It held the appellant had failed to conduct formal discovery, make reasonable inquiries and abide by former rulings. It also found that the appeal was consistent with the appellant's groundless, vexatious lawsuits brought to harass opposing parties. In *Johnson v. Brimlow,* 164 Ariz. 218, 222, 791 P.2d 1101, 1105 (App. 1990), we awarded sanctions under Ariz. R. Civ. App. P. 25 holding that the appeal was frivolous, that is, it was either brought to harass the opposing party or delay the effect of an adverse judgment or was so lacking in merit that any reasonable attorney would find it was not meritorious.

**¶167** We conclude that the Levys' appeal meets these standards for purposes of sanctions. This case initially involved a $16,500 claim for rent which itself was frivolous. The record supports the superior court's conclusion that that simple, nonmeritorious claim has blossomed into an unending tale of litigation gone amuck, fulfilling the Levys' threat to prolong this matter to attempt to wring money out of Englund. The appeal itself for the most part is simply a continuation of that conduct with the Levys raising issues that are already precluded, raising

nonmeritorious issues to attack the superior court's authority to rule on the fee request, and misciting of authorities. Only one of the Levys' arguments had any merit; that the superior court erred in awarding attorneys' fees, costs and legal expenses for *Levy I* and *Levy v. Swann*. The fact that one argument was meritorious should not immunize the Levys from sanctions for all of the rest of their nonmeritorious arguments. At some point, this type of conduct must be sanctioned. This is that point.

**¶68** Accordingly, we will award Englund his reasonable attorneys' fees incurred related to this appeal on timely compliance with Ariz. R. Civ. App. P. 21. Such fees should not include any time Englund's counsel spent on briefing the issue of attorneys' fees incurred in the prior appellate matters We will also award costs to Englund as the prevailing party pursuant to A.R.S. 12-331 (2003) upon timely compliance with Ariz. R. Civ. App. P. 21.

## CONCLUSION

**¶69** We affirm the judgment and post-judgment order awarding attorneys' fees, litigation expenses and costs, as modified herein. On remand, the superior court shall enter a modified judgment awarding Englund a total of $212,481.09 plus any attorneys' fees and costs we award on appeal. We also affirm the denial of the Levys' motion for new trial. We remand this matter to the superior court for further proceedings consistent with this decision. Nothing in this

decision precludes the superior court on remand from awarding additional attorneys' fees, litigation expenses and costs incurred by any party on remand from this decision.

/s/ _____
DONN KESSLER, Presiding

CONCURRING:

/s/ _____
PATRICIA A. OROZCO, Judge

/s/ _____
MAURICE PORTLEY, Judge

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | |
|---|---|
| Robert A. Levy and Phyllis B. Levy, husband and wife, Plaintiffs-Appellants, v. William A. Englund, a single man, Defendant-Appellee. | Court of Appeals Division One No. 1 CA-CV 07-0260 MARICOPA COUNTY Superior Court No. CV 2001-011987 DEPARTMENT E **ORDER** (Filed Sep. 04, 2009) |

The Court has considered Appellants' Motion for Reconsideration, Appellee's Motion for Reconsideration, Appellee's Declaration and Application for Costs and Attorneys' Fees on Appeal, Appellee's Statement of Costs Including Attorneys' Fees, Appellants' Objections to Appellee's Declaration and Application for Costs and Attorneys' Fees on Appeal and to Appellee's Statement of Costs Including Attorneys' Fees, and Appellee's Reply in Support of Declaration and Application for Costs and Attorneys' Fees on Appeal and Statement of Costs Including Attorneys' Fees.

**IT IS ORDERED** denying Appellants' Motion for Reconsideration.

**IT IS FURTHER ORDERED** denying Appellee's Motion for Reconsideration. Such Motion was untimely and not well-taken. As discussed in this Court's memorandum decision filed July 23, 2009, this Court

and the Arizona Supreme Court previously denied requests for awards of attorneys' fees and costs in prior appellate matters in this litigation. Appellee's reference to an order of this Court in *Levy v. Englund*, 1 CA-CV 04-0161 (dated October 6, 2004) erroneously assumes that in that order this Court permitted Appellee to file an application for fees if he prevailed in the litigation. That order was issued by a motions panel of this Court and related to a motion for reconsideration of a July 29, 2004 order denying a fee request relating to a motion to quash a writ of execution of the first judgment. The merits panel in that appeal later denied any fees in that appeal.

**IT IS FURTHER ORDERED** that pursuant to Arizona Rule of Civil Appellate Procedure ("Rule") 3 and in the furtherance of the interests of justice, the Court waives the requirements for timely filing an application for an award of attorneys' fees and costs contained in Rule 21.

**IT IS FURTHER ORDERED** awarding Appellee $19,349.50 in attorneys' fees incurred in this appeal and $215 in costs incurred in this appeal.

**DATED** this 4th day of September, 2009

s/ Donn Kessler
DONN KESSLER,
Presiding Judge

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

| | |
|---|---|
| ROBERT A. and PHYLLIS B. LEVY, husband and wife<br><br>Plaintiff,<br><br>v.<br><br>WILLIAM A. ENGLUND, a single man,<br><br>Defendant. | CASE NO. CV2001-011987<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**<br><br>(Assigned to the Honorable Patrick E. Eldridge) |

This matter came on for hearing on November 7, 2006, after remand from the Court of Appeals, directing that the Court hold a hearing on the issue of reasonableness of any amounts awarded as attorneys' fees as of right or as sanctions and the reasonableness of any costs or litigation expenses.

The Court having read all of the submissions, heard the evidence, reviewed the exhibits and the arguments of the parties, and otherwise being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

### Facts Relating to the Underlying Dispute

1. At all times relevant to this matter, Plaintiffs Robert A. and Phyllis B. Levy, husband and wife, owned a 4.8 acre parcel of vacant land referred to as Lot 9, Mohawk Park, in the City of Phoenix, Arizona.

2. The Levys own Lot 9 free and clear of any liens.

3. In or about March, 2004, the Levys were offered in excess of $940,000 for the purchase of Lot 9, the same offer made to adjoining property owners.

4. From December, 1993 through September, 2004 Defendant William A. Englund owned Lot 10, Mohawk Park, in the City of Phoenix, Arizona.

5. Lot 10 adjoined Lot 9 on a Lot 9's eastern border.

6. On or about August 1, 1994 Plaintiffs and Defendant entered into an Agreement of Lease for Lot 9.

7. The term of the Lease expired on December 31, 1998.

8. Rent under the lease was $13,250, payable in 53 installments of $250.00 each.

9. In addition, Defendant agreed to pay any increase in the annual property taxes from the 1993 amount of $2,100 on Lot 9 for the tax years 1994-1998.

10. In November 1997, the parties agreed to increase the monthly payment from $250.00 to $355.00 to cover increases in the annual taxes by equal monthly payments.

11. In November, 1998, Defendant offered to renew the Lease for five years. The parties dispute the terms of this offer.

12. On November 18, 1998, Plaintiffs counter-offered to renew the Lease for five years for $60,000, payable at $1,000 per month. Defendant did not accept this offer.

13. On or about December 15, 1998, Plaintiffs sent Defendant a letter stating

> We received your check for December, enclosed is a statement on your tax account, but you haven't responded to our proposed renewal of your lease.
>
> If we don't hear anything further from you, we are going to assume that you are continuing to use the property (Lot 9, Mohawk Park). The monthly rent on a month-to-month basis will be $550 for the month beginning January 1, 1999. That would mean that we would expect a payment

> of $550 plus the $105 tax payment, making a total of $655 due on January 1, 1999. We will give you 30 days notice of any changes in the monthly rent.
>
> Please let us hear from you.

14. Shortly after the original lease was signed, Defendant built a chain link fence with a gate along the south property line of Lot 9, which fronts on Mohawk Lane.

15. Defendant kept the front gate padlocked at least until December 31, 1998. The parties dispute when Defendant removed the padlock.

16. On January 9, 1999, defendant mailed Plaintiffs a check dated January 3, 1999, for $355.00.

17. On February 16, 1999, Plaintiffs received a check from Defendant in the amount of $313.64.

18. After receiving the check for $313.64, Plaintiffs realized that Defendant's January check for $355.00 plus his February check for $313.64 equaled Defendant's outstanding tax balance of $668.64 for the 1998 tax year.

19. Despite having specific knowledge that the January and February checks were for tax payments, and were in an amount agreed to by Plaintiffs (see ¶10 above), and were not in the amount of the proposed increase rent payment, (see ¶13, above), Plaintiffs pursued a claim against Defendant for Equitable Estoppel based on an alleged reliance on the fact that the payments were for rent, not taxes, filing a

summary judgment motion on the issue and submitting jury instructions on the question.

20. Defendant purchased Lot 10 in December 1993 from Dennis and Yvonne Hilker.

21. The Hilkers leased Lot 9 from Plaintiffs.

22. The Hilkers used the Plaintiffs' property to dump substantial amounts of manure from their horse farm operation.

23. Plaintiffs disclosed exhibits including photos and videotapes that pre-dated Defendant's ownership of Lot 10, that clearly show the existence of manure piles on Lot 9.

24. In anticipation of filing this suit, Plaintiffs took a series of photographs of the locked front gate to the property. Two of these photos were taken before the lease expired and showed Lot 10 in the background. The third photo was taken three months after the lease expired but was taken facing away from Lot 10. The earlier two photos were taken near the end of the Lease term and were taken with the intent of creating evidence to use in a lawsuit the Levys already intended on filing without regard for whether Mr. Englund actually continued to use the property or not.

25. Any hesitancy Plaintiffs may have had in filing this suit disappeared when Defendant's daughter, Lisa Englund, made a complaint to the city of Phoenix that Plaintiffs had failed to control the weeds growing on Lot 9 almost two-and-a-half years after the Lease

expired. Plaintiff was forced to cut down the weeds by the city. This lawsuit followed, in part in retaliation for that report.

26. Despite a rental agreement for rent at $250.00 per month plus taxes and despite a high-ball estimate of $14,000 to remove the manure and debris, Plaintiffs at various times disclosed a desire to seek additional bad faith or punitive damages of $100,000 to $1,000,000, thereby requiring Mr. Englund's counsel to defend a much larger claim than is apparent from the pleadings.

**Facts Relating to the Plaintiffs' Litigation Tactics**

27. In a conversation with Defendant's counsel, Leon Silver that occurred just after a pre-trial conference on December 5, 2002, and in subsequent phone conversations, Plaintiff Robert Levy stated his intent to make this litigation take as long as possible and be as expensive as possible in order to force Defendant to settle the claim and pay money to Plaintiffs. Mr. Levy further stated that, while he was aware he could face an award of attorneys' fees in Mr. Englund's favor, he had no fear that attorneys' fees would be awarded to Mr. Englund because the arbitrator chose not to award fees.

28. Plaintiffs filed an unusually large number of requests for extensions of time and for trial continuances in the trial court, court of appeals, and Arizona Supreme Court.

29. Plaintiffs filed an unusually large number of substantive motions in the trial court, the court of appeals and the Arizona Supreme Court, at various times had identical motions pending in the different courts, and filed motions that had no relation to the issues in dispute in the case.

30. Plaintiffs sought to needlessly and inappropriately expand the issues in the case, thereby raising the fees incurred in defense even higher. These actions included pursuit of a number of conspiracy theories involving all manner of co-conspirators, including but not limited to this Court (who Plaintiffs alleged was installed as judge at the behest of the Maricopa County Board of Supervisors and the former Maricopa County Assessor solely to retaliate against the Levys for a successful property tax challenge), former Maricopa County Superior Court Presiding Judge Robert Myers, Defense counsel, Jamie Brody (a lawyer with whom the Levys consulted), lay-witness Mark Manos, Mr. Manos' counsel, lay-witness Laura Manos, purported expert witness Brent Bowles, lay witness Yvonne Hilker and non-party Swift Transportation and its president Jerry Moyes. (According to Plaintiffs, Swift and Moyes were allegedly instrumental in having this judge appointed to preside over this case in retaliation for a lawsuit filed by Plaintiffs in federal court in New Mexico accusing Swift of conspiring with, and running drugs for the CIA, and intentionally running Plaintiffs off the road in on-going attempts by the CIA to kill or harass them.)

The Court finds that the needless introduction of these far-fetched conspiracy theories further increased the cost of defending the case.

31. Plaintiffs falsely obtained and/or disclosed lay and expert witness testimony; including:

a. Brent Bowles: In their disclosures, Plaintiffs identified Brent Bowles as an expert witness who was going to testify to his opinion on the fair rental value of the property.[1] In his deposition, however, Mr. Bowles testified that the disclosure was not his opinion and that he was not qualified to give such an opinion. He further testified that he feared that he too could become a target of the "sue happy" Plaintiffs.

b. Jim Wenger: In response to Mr. Englund's Motion for Summary Judgment, Plaintiffs submitted the previously undisclosed testimony of Jim Wenger to the effect that Mr. Wenger observed people coming from the Englund property on to the Levy property from 1994 through 2000, to dump manure. Mr. Wenger subsequently submitted a declaration in

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[1] The Court notes that "fair rental value of the property" should never have been an issue in the case because the allegation was that Mr. Englund "held over" from an existing lease. In the case of a hold-over, the damages under Arizona law are limited to the amount of rent called for in the pre-existing lease. *Alabam Freight Lines v. Stewart*, 70 Ariz. 140, 217 P.2d 586 (1950) Despite this clear legal principal, Plaintiffs devoted a great deal of effort to trying to establish a significantly higher fair rental value, including having disclosed two different experts to testify to this issue.

which he recanted this testimony. Mr. Wenger explained that Mr. Levy led him to believe that the issue in the lawsuit was whether someone from the Englund property had ever used the Levy property for any purpose. He explained that had he known that the issue in the case was whether the property was being so used after a specific date, he would not have signed the Declaration the way Mr. Levy drafted it. Additionally his initial declaration stated that the people from the Englund property were dumping manure on the Levy property. In his subsequent Declaration Mr. Wegner explained that this fact was supplied by Mr. Levy and was not his observation. He stated that had Mr. Levy disclosed to him that Mr. Englund's position in the case was that his people had been taking the manure from the property to use in the horse-boarding operation on the Englund property, he would not have signed the Declaration, as he could not tell what the people whom he observed were doing other than that they were driving tractors to and from the property.

c. Laura Palmer a/k/a Laura Manos: Plaintiffs twice disclosed Laura Manos as someone who would testify regarding Mr. Englund's additional usage of Lot 9 after January 1, 1999. Upon examination in deposition, however, Ms. Manos testified that she witnessed this activity through only December 1998 – the date the lease terminated – and that she did not have any knowledge of this occurring after January 1, 1999. In response to Mr. Englund's Motion for Summary Judgment on this point, Plaintiffs obtained

a Declaration from Ms. Manos in which she stated that she had witnessed Mr. Englund's tenants or workers on Lot 9 after January 1, 1999. In a discussion with Mr. Silver, Ms. Manos informed him that while the Plaintiffs drafted the Declaration and asked her to sign it, they never disclosed that the issue in the lawsuit was whether the activity occurred before or after December 31, 1998 as that was the expiration date of the Lease. She stated that had she known that the date was the issue, she would not have signed the declaration the way it was written, because she simply was not sure of when the activity ceased.

d. Glen Ghormley: Plaintiffs disclosed Mr. Ghormley as an "expert" witness who was going to testify that the cost to remove the manure and debris from their property was $14,000. Upon discussion with Mr. Ghormley defense counsel learned that the Plaintiffs did not disclose the fact that they sought his testimony for litigation. Rather, Mr. Ghormley thought he was bidding on a job, and therefore he was engaged in a negotiation when he offered to clean up the manure and other debris for $14,000. In fact, he expected to be negotiated down by as much as several thousand dollars. Upon learning of the issues in dispute in the litigation and the anticipated use of his

testimony, Mr. Ghormley refused to further cooperate with Plaintiffs.[2]

c. Brad Drenning: Plaintiffs disclosed Brad Drenning as a witness who was going to testify that the documents produced by Mr. Englund showing that he paid Waste Management to haul off his garbage, including the manure from the horse boarding operation, were documents showing only general waste collection and not manure collection. Upon inquiry, Mr. Drenning disclosed that the Levys never informed that there was even a lawsuit pending in which he would be asked to testify, but rather, they merely approached him as though they were customers and asked about general billing practices.

In light of this evidence the Court finds that the Levys violated their obligation of candor to the witnesses, to the court and to opposing counsel and thereby needlessly and substantially increased the cost for Mr. Englund to defend the case. The Court finds that given what was discovered upon investigation of the disclosures, it was appropriate, if not mandatory, for defense counsel to thoroughly investigate any evidence, claim or theory put forth by

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[2] Rather than accept that it would serve them better if they were completely honest with their own witnesses, Plaintiffs instead wrongfully accused defense counsel of witness tampering.

Plaintiffs to determine the bona fides of the disclosed item.

32. In response to Defendant's Motion for Summary Judgment regarding the manure pile issue, Plaintiff submitted a still photograph taken from a July 1994 videotape that, according to the sworn Declaration of Plaintiff Phyllis Levy, purportedly showed the exact spot on Lot 9 where the manure pile at issue allegedly then sat.

33. Mr. Silver testified that based on a detailed and careful review of the video tape from which the still photograph was taken, along with an aerial photograph of the property taken in April, 1995, he was prepared to demonstrate at trial that the still photograph was intentionally taken of an area to the south and east of the then existing manure piles, and therefore it was apparent that Mrs. Levy had perjured herself in her declaration in opposition to Mr. Englund's Motion for Summary Judgment.

## CONCLUSIONS OF LAW

34. The Court finds that Mr. Englund is entitled to his taxable costs pursuant to A.R.S. §12-341 and/or Rule 76(f), Ariz.R.Civ.P.

35. The Court finds that Mr. Englund is entitled to recover his reasonable attorneys' fees and expert witness fees pursuant to Rule 76(f), Ariz.R.Civ.P. The Court finds that the imposition of fees against Plaintiffs will not create such a substantial economic

hardship as to not be in the interests of justice, particularly considering the findings in paragraphs 1-3 above.

36. The Court finds that this matter primarily arose out of contract, namely the breach of, or hold-over from a written lease and failure to clean up debris as allegedly required by the contract. The Court has weighed the factors established by Arizona case law for the award of fees under this statute, See, *Wagenseller v. Scottsdale Memorial Hospital,* 147 Ariz. 370, 710 P.2d 1025, 1049 (1985), *Associated Indemnity Corporation v. Warner,* 143 Ariz. 567, 694 P.2d 1181, 1183 (1985), as follows:

a. The merits of the claim or defense presented by the unsuccessful party;

b. Whether the litigation could have been avoided or settled, and whether the successful party's efforts were superfluous in achieving the result;

c. Whether assessing fees against the unsuccessful party would cause an extreme hardship;

d. Whether the successful party prevailed with respect to all of the relief sought;

e. The novelty of the legal questions presented, and whether such claims or defenses had previously been adjudicated in this jurisdiction;

f. Whether such claim or defense had previously been adjudicated within this jurisdiction; and

g. Whether the award would discourage parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees.

The Court finds that all of these factors weigh in favor of an award of fees to Mr. Englund. As the successful party in the action, Mr. Englund is therefore entitled to an award of reasonable attorneys' fees pursuant to A.R.S. § 12-341.01(A).

37. Rule 11(a), Ariz.R.Civ.P. provides in part that "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a goood faith argument for the extension, modification, or reversal of existing law; ***and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.***... If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee." (Emphasis supplied.)

The Court finds that Plaintiffs violated Rule 11(A) in a number of respects including:

a. Given the nature of the investigations performed by Plaintiffs as reflected in the testimony of witnesses they disclosed regarding the use of the property by Mr. Englund after the termination of the Lease (paragraph 31 above), the refusal of Plaintiffs to acknowledge the evidence of the existence of the manure piles on the property prior to entry of the lease (paragraphs 22, 23, 32, & 33 above), and that Plaintiffs appear to have intentionally misrepresented or manufactured evidence regarding the manure and the use of the property (paragraphs 31-33 above), the Court finds that Plaintiffs' claims were not well grounded in fact and not based on a good faith belief formed after a reasonable investigation, such that the imposition of sanctions is appropriate under the Rule.

b. Given the unusually large number of motions filed, and particularly the unusually large number of motions for extension of time and motions to continue trial and other hearings, as noted on the various court dockets, in the opinion of Mark Harrison and the testimony of defense counsel, as found in paragraphs 28 and 29 above, and considering Mr. Levy's comments to defense counsel as described in paragraph 27 above, and Mr. Levy's comments contained in his Declaration dated May 10, 2006, and the other items stated in paragraph 30 above, the Court finds that Plaintiffs repeatedly acted with an improper purpose, namely to harass Mr. Englund or to cause unnecessary delay or needless increase in the cost of litigation, such that the imposition of sanctions is appropriate under the Rule.

c. For these violations of Rule 11(A), Ariz.R.Civ.P. the Court awards Mr. Englund his reasonable attorneys' fees and all of his non-taxable litigation expenses, including expert witness fees which will be set forth below.

38. The Court finds that Plaintiffs' conduct as set forth in paragraphs 13, 18, 19, and 22-33, above, in each instance and taken in the context of the entire action, was unreasonable, groundless, abusive, or obstructionist in violation of Rule 26(f), Ariz.R.Civ.P and therefore awards Mr. Englund his reasonable attorneys' fees and all of his non-taxable litigation expenses, including expert witness fees which will be set forth below. The Court notes that Plaintiffs sought discovery regarding their conspiracy theories at the very beginning stages of this litigation, indicating not only that discovery was interposed for an improper purpose but the lawsuit was as well, and therefore determines that fees and costs for the entire litigation may be independently awarded under this Rule. The Court also finds that Plaintiffs actions were not substantially justified and there are no other circumstances which made the award of expenses unjust.

39. The Court finds that Plaintiffs made disclosures pursuant to Rule 26.1 that they knew or should have known were inaccurate or incomplete and thereby caused Mr. Englund to engage in needless investigation or discovery. Accordingly, the Court finds that Plaintiffs are liable to Mr. Englund for his reasonable attorneys' fees, costs and litigation

expenses, including expert witness fees pursuant to Rule 37(C), Ariz.R.Civ.P.

40. The Court finds that Plaintiff submitted declarations in bad faith as set forth in paragraphs 30, 31, & 32 above in response to Defendant's Motion for Summary Judgment, such that the imposition of sanctions pursuant to Rule 56(f), Ariz.R.Civ.P. are appropriate. Accordingly, the Court finds that Plaintiffs are liable to Mr. Englund for his reasonable attorneys' fees, costs and litigation expenses, including expert witness fees for this violation.

41. For the reasons set forth in paragraph 37 through 40 above, the Court finds by clear and convincing evidence that the claims brought by the Plaintiffs constitute harassment, were groundless, and were not made in good faith. The Court therefore awards Mr. Englund, as a sanction, his reasonable attorneys fees, expenses (including expert witness fee) and the statutory maximum of $5,000 under A.R.S. §12-349(A). For the reasons set forth in paragraph 37 through 40 above, and the paragraphs mentioned therein, the Court finds that Plaintiffs:

a. Brought this claim without substantial justification, meaning that the claim constituted harassment, was groundless and was not made in good faith.

b. Brought the claim and filed many motions solely or primarily to cause delay or to harass Mr. Englund.

c. Unreasonably expanded or delayed the proceeding, and,

d. Engaged in abuses of discovery and disclosure.

42. The Court finds that the attorneys' fees, costs and non-litigation expenses claimed by Mr. Englund are reasonable in the circumstances of this litigation.

43. The Court finds that the hourly rates charged by the various professionals identified in the billing spreadsheets are reasonable for lawyers, paralegals and clerks of similar experience in the community and that the time spent on the tasks identified were reasonable.

44. The Court finds that the rates charged and fees incurred by Mr. Englund's expert witness, Mark Harrison are reasonable.

45. The court finds that the vast majority of the work billed was billed as a result of the tactics employed by the Plaintiffs, including but not limited to raising issues and claims without legal or factual justification, making claims that they knew were false, re-raising issues that had been previously decided, and engaging in or attempting to engage in obstructionist or "hide-the-ball" litigation behavior with regard to the filing of joint documents like pre-trial statements and in the submission of exhibits.

46. The Court finds that Mr. Englund is obligated to pay all of the fees sought by his application and

therefore an award of all of those fees against Plaintiffs is appropriate.

47. The Court includes in its award, an award of the reasonable attorneys' fees and costs incurred as a result of the several appeals and special actions filed by Plaintiffs. The Court finds that these fees and costs are appropriate under Rule 76(f), Ariz.R.Civ.P. and A.R.S. §12-341.01 as Mr. Englund is the ultimately successful party on all issues in the case. In the alternative, the Court finds that Mr. Englund is entitled to these fees and costs, along with his non-taxable litigation expenses incurred on the various appeals and special actions under Rules 11(A), 26(f), 37(C) and/or 56(g), Ariz.R.Civ.P. and/or A.R.S.§§12-340.01(C) or 349(A). The Court also finds that these fees are appropriate as they were incurred in post judgment proceedings, which were accounted for in the original judgment of this Court in this Matter, and that part of the judgment was not overturned on appeal.

**JUDGMENT**

IT IS HEREBY ORDERED, entering judgment in favor of Defendant William A. Englund, and against Plaintiffs Robert A. and Phyllis B. Levy as follows:

1. For reasonable attorneys' fees in the amount of $253,265.00

2. for additional damages of $5000 pursuant to A.R.S. § 12-349(A).

3. for taxable costs in the amount of $ 1,825.00

4. for non-taxable litigation expenses, including expert witness fees, in the amount of $ 19,811.00

5. for post judgment interest on the above sums at the rate of 10% per annum from the date of judgment until paid in full.

IT IS FURTHER ORDERED that Plaintiff shall be able to amend this judgment or seek additional judgments from time to time to recover all after incurred costs and attorneys' fees associated with post judgment proceedings, including collection.

THE COURT FURTHER FINDS that there is no just reason for delay and that final judgment shall be entered pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure.

DATED this 21 day of November, 2006.

/s/ Patrick Eldridge
Hon. Patrick Eldridge
Judge Pro Tempore

Leon B. Silver #012884
**SHUGHART THOMSON & KILROY, P.C.**
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ. 85012
Telephone: (602) 650-2000
Facsimile :(602) 264-7033

Attorneys for Defendant

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

| | |
|---|---|
| ROBERT A. and PHYLLIS B. LEVY, husband and wife<br><br>Plaintiff,<br><br>v.<br><br>WILLIAM A. ENGLUND, a single man,<br><br>Defendant. | CASE NO. CV2001-011987<br><br>**ORDER DENYING PLAINTIFFS' AMENDED MOTION FOR NEW TRIAL AND AMENDING THE NOVEMBER 21, 2006 JUDGMENT**<br><br>(Assigned to the Honorable Patrick E. Eldridge) |

The Court has received Plaintiffs' Motion for New Trial, Defendant William A. Englund's Response to the Levys' Motion for New Trial, Plaintiffs' Amended Motion for New Trial, Defendant William A. Englund's Response in Opposition and Motion to Treat Plaintiffs' Amended Motion for New trial as a Reply Brief, and

Plaintiffs' Reply in Support of Amended Motion for New trial, has considered the arguments therein and for good cause appearing:

IT IS HEREBY ORDERED DENYING Plaintiffs' Amended Motion for New Trial;

IT IS FURTHER ORDERED amending the Judgment entered by this Court on November 21, 2006, *nunc pro tunc,* as follows: striking the word "May" from line 17 of page 10 and inserting the word "March"; and striking the word "Plaintiff" from page 13, line 13 and inserting the word "Defendant."

DATED: February 2, 2007.

/s/ Patrick Eldridge

The Honorable Patrick Eldridge
Judge Pro Tempore of the
Superior Court

**Supreme Court**

STATE OF ARIZONA

January 6, 2010

**RE: ROBERT LEVY et ux v WILLIAM A ENGLUND**
**Arizona Supreme Court No. CV-09-0270-PR**
**Court of Appeals Division One**
**No. 1 CA-CV 07-0260**
**Maricopa County Superior Court**
**No. CV 2001-011987**

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 5, 2010, in regard to the above-referenced cause:

**ORDERED: Appellee's Petition for Review = DENIED.**

**FURTHER ORDERED: Appellants' Cross-Petition for Review = DENIED.**

**FURTHER ORDERED: Request for Attorneys' Fees (Appellee Englund) = DENIED**

Record returned to the Court of Appeals, Division One, Phoenix, this 6th day of January, 2010.

Rachelle M. Resnick, Clerk

TO:
Robert A. Levy
Leon B. Silver
Philip G. Urry
adc

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

| | |
|---|---|
| Robert A. Levy and Phyllis B. Levy,<br>Plaintiffs,<br>v.<br>William A. Englund,<br>Defendant. | **No. CV2001-011987**<br>**PLAINTIFFS' AMENDED MOTION FOR NEW TRIAL**<br>(Assigned to The Honorable Patrick E. Eldridge) |

Pursuant to Rule 59(a) and Rule 59(c)(1), Arizona Rules of Civil Procedure, plaintiffs Robert A. Levy and Phyllis B. Levy herewith file this their Amended Motion for New Trial, and for grounds respectfully set forth the following:

## MEMORANDUM IN SUPPORT OF MOTION

On November 21, 2006, the court entered its Findings of Fact, Conclusions of Law and Judgment in an amount totaling $279,901.00 and entered its Order exonerating plaintiffs' supersedeas bonds amounting to $201,452.10 to defendant; on that same

date plaintiffs remitted to defendant $78,488.90, thereby completing satisfaction of the judgment. On December 5, 2006, plaintiffs filed their original Motion for New Trial. This amended motion for new trial incorporates their original motion and includes additional material.

Pursuant to the amended Memorandum Decision of the Arizona Court of Appeals entered May 23, 2005, on November 7, 2006, a hearing was held on the issue of the reasonableness of the attorneys fees awarded to defendant William A. Englund in the original and three supplemental judgments of this court vacated by the court of appeals. The attorneys' fee hearing consisted of the following three parts:

1. A session in Judge Swann's courtroom in the Old Courthouse on Tuesday, November 7, 2006, from 1:30 p.m. to 5:05 p.m, Judge pro tem Eldridge presiding (HEARING I).

2. A session in the conference room of Shughart Thomson & Kilroy on Wednesday, November 8, 2006, from 9:30 a.m. to 11:36 a.m., Judge pro tem Eldridge presiding (HEARING II). A compressed copy of the transcript of HEARING II is attached hereto for electronic filing. A hard copy is enclosed with the copy of this motion mailed to Judge Eldridge. Defendant's counsel have their own hard copy.

3. Testimony and argument in writing submitted by plaintiffs in their OBJECTION TO DEFENDANT'S NOTICE OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FORM OF

JUDGMENT, WITH ARGUMENT AND TESTIMONY BY PLAINTIFFS (HEARING III), filed and served November 15, 2006, pursuant to agreement by the parties and the court.

## A. IRREGULARITIES IN THE PROCEEDINGS OF THE COURT WHICH DEPRIVED PLAINTIFFS OF A FAIR TRIAL.

### 1. The Court Erred in Failing to Provide Sufficient Time to Complete the Hearing.

When the hearing ended at 5:00 p.m. Tuesday, November 7, 2006, the court gave the parties two choices, 1) wait until December and come back to Phoenix again, or 2) have the hearing continue the following day at 9:30 at the offices of defendants' counsel (HEARING I, Transcript 148-150, Exhibit 1 of defendant's response to motion for new trial, HEARING II, Transcript 10:8-12). Neither of these choices was satisfactory. It was unfair to plaintiffs to have the hearing in opposing counsel's offices, where defendant's counsel had access to all their documents, facilities, and support personnel, whereas plaintiffs' materials were stuck in their vehicle in the parking lot,[1] about which they complained to the court, HEARING II, Transcript 10:1-16. By not having their

[1] When plaintiffs had previously been to the office of defendant's counsel, they parked either on the street or in the service area and did not know how remote and inconvenient the main parking lot would be when they arrived on November 8 for the conclusion of the hearing.

documents in front of them, plaintiffs were hampered in their cross-examination of Mr. Silver, as the following examples illustrate:

> 51:1 Mr. Silver relies on the absence of documents
>
> 51:24 Mr. Silver evades the question by saying he doesn't have all the documents in front of him
>
> 53:22-54:3 Mr. Silver again relies on the absence of documents.
>
> 54:25-56:5 Mr. Silver minimizes his failure to tell the truth, which the documents would have shown to be important.

The court erred in setting the hearing on "the only afternoon open for quite a while" (HEARING I, transcript 150:4-5, without insuring that more time would be available. This is especially relevant since plaintiffs had moved to change the hearing date because it had been set too soon and the court denied their motion. The court also erred in not leaving the afternoon of November 8 open in case the hearing lasted longer. These are errors made by the court, not examples of the court using its inherent power to control the proceedings.

And more importantly, although the court mentioned in passing that the hearing could not be held on Wednesday afternoon because of a prior commitment (HEARING I, Tr. 149:18-19), the court erred in failing to advise the parties that the court's schedule did not permit the hearing to last beyond 11:30 a.m.

on the following day. The court erred in waiting until 11:05 a.m. November 8, 2006, after it had set a 10-minute break, to advise the parties of its schedule (HEARING II, transcript, p. 62). The court also erred in stating that "we all agreed it would take about two hours" (Tr. 62:16), when no such agreement had occurred.

**2. The Court Erred in Failing to Give Plaintiffs the Opportunity to Complete Their Cross Examination of Mr. Silver.**

The court erred in denying plaintiffs a full opportunity to complete their cross-examination of Mr. Silver, instead pressing Mr. Levy to hurry up. Defendant had the entire afternoon on November 7 to present his case, from 1:30 p.m. until shortly after 5:00 p.m. The court told plaintiffs that they could accomplish their task in their own testimony or in closing argument instead of through cross-examination, HEARING II, Transcript, 65:14-16.

The court's error is again illustrated by a passage at 68:1 of the transcript:

> Mr. Levy: I'm going to have to object to the – the speeded up schedule of this – of this proceeding.
>
> The Court: Mr. Levy, please proceed. You are wasting time.

But it was not Mr. Levy who was wasting time. It was Mr. Silver, by his long-winded answers to

Mr. Levy's questions, and by Mr. Ansel's constant objections, alleging that Mr. Levy's questions were argumentative. In so doing, defendant's counsel succeeded in running out the clock, further contributing to denying plaintiffs a fair trial.

Furthermore, the court erred in sustaining objections to or objecting itself to questions to Mr. Silver which it labeled argumentative or inappropriate. These were leading questions which the court should have permitted Mr. Silver to answer. Example: The court erred in providing an answer for Mr. Silver, HEARING II, Tr. 57:6-10. Defendant's Response to Plaintiffs' motion for new trial, at page 7:14-18, listed fifteen other such instances, all of which except the one at 22:14-18 should have been permitted. In particular, at 65:8-13, the court prevented plaintiffs from obtaining important information about Mr. Silver's wrongful activities.[2]

When plaintiffs said they were finished, it was not because they had completed their cross-examination;

---

[2] In his response to plaintiffs' motion for new trial, defendant complained about Mr. Levy's use of the phrase "shoot at" in trying to explain the term "fair game" to Mr. Mark Harrison. Defendant failed to grasp that Mr. Levy was simply employing a figure of speech. And at the end of the proceedings, Mr. Levy, trying to conclude on a friendly note, expressed a joke to Mr. Silver. This joke must have hit a raw nerve with Messrs. Silver and Ansel, for neither of them wanted to hear the punch line after the hearing ended. The court rightly made no effort to exercise its inherent power to control the proceedings regarding these trivialities.

it was because of the time-constraints imposed on them by the court. They needed time for their own testimony – it was only after Mr. Levy began his own testimony that the court and defendant offered to allow plaintiffs to finish their testimony later in writing. If plaintiffs had been advised of this at the outset, they might have been able to finish their cross-examination during the remaining time available. The following exchanges are instructive:

> At 65:17-20 Mr. Levy: All right. All right. Okay. Well, I have a lot of other things I'd like to talk about, but maybe I'd better quit. I don't know what to do. Just let me make sure what I want to do.
>
> At 67:25-68:5 Mr. Levy: All right. I think I'll – I – I don't know what to do. Your honor, I'm going to have to object to the – the speeded-up schedule of this – of this proceeding.
>
> The court: Mr. Levy, please proceed. You are wasting time.

These statements immediately preceded Mrs. Levy's statement that she had no questions for Mr. Silver. Although Mrs. Levy had no questions, Mr. Levy still had questions for Mr. Silver, and he objected to the speeded-up schedule of the hearing. Mr. Levy was intimidated by the court's constant insistence on speed-up, urging Mr. Levy to substitute his own testimony and argument for cross-examining Mr. Silver, erroneously sustaining defendant's objections,

and itself objecting to legitimate questions by Mr. Levy to Mr. Silver.

The court erred in using its power to control the proceedings for these purposes and should allow the matter to be retried.

### 3. The Court Erred in Not Giving Plaintiffs Sufficient Access to Court Facilities.

Because of the court's pro tempore status, a two-tier system of justice has been created in the Maricopa County Superior Court. Had the court been a regular judge of the Superior Court, there would have been no problems with availability of a courtroom. Nor would reliance on outside court reporters have been necessary. The fees charged by outside court reporters are not subject to control by the court. The defendant's counsel Leon Silver, also being a pro tem judge of the Superior Court, also contributes to defeating the purpose of an impartial judicial system.

Mr. Levy was under pressure from the court, from defense counsel, and from the clock, all of which were unjustified. Such pressure constitutes an example of how a two-tier system of justice operated to deny plaintiffs a fair trial and is grounds for a new trial.

**4. The Court Erred in Failing to Limit the Hearing to Fees Generated in the Original and Three Supplemental Judgments.**

In addition to the mandate of the Court of Appeals, this court, at the Status Conference on July 27, 2006, set the guidelines for the hearing, beginning at page 8, line 17: "I believe that the issues are fairly well teed-up, based upon prior applications and prior supplemental judgments of the earlier assigned trial Judge." And again at page 9, line 3: "Now it is not inconceivable that **were you not to prevail** in front of whoever hears the matter ultimately, that the defendants might seek fees in connection with those proceedings. I would expect that they would. That application would likely be premature at this point. It would be subject to attack as merely speculative at this point" (Emphasis added). Thus, the hearing should have been limited to issues in the prior applications and prior supplemental judgments since the other fees were speculative pending a determination of which party prevails on the remanded issues.

The ultimate question at the hearing was which party would prevail on the remanded issues. If the amount of fees and costs awarded to defendant was less than those awarded in the original judgments, plaintiffs would be the prevailing parties, and defendant would not be entitled to any additional fees generated, either in this court or appellate courts. But because the court allowed the hearing to encompass every fee generated by defendant during the entire course of the action, in this court and in the

appellate courts, it could become impossible for plaintiffs to prevail, because even if the above-mentioned fees were reduced, subsequent fees would obliterate the difference.

## B. IRREGULARITY IN THE PROCEEDINGS OF THE PREVAILING PARTY; MR. SILVER'S TESTIMONY SHOULD NOT HAVE BEEN ADMITTED.

Defendant's attorney Leon Silver presented his testimony in the courtroom on November 7, 2006. His testimony included a large amount of hearsay material relating to what was said to him by plaintiffs' witnesses. This testimony formed the basis for defendant's proposed findings of fact and therefore forms the basis for granting a new trial.

Plaintiffs objected to defendant's introduction of Exhibits relating to the merits of the underlying case. Defendant said it was only for the purpose to justifying his time, but in effect it was a double edged sword, enabling defendant to put on his case on the merits, while preventing plaintiffs from doing so to counter defendant's defense.

The question of the admissibility of Mr. Silver's testimony is not to be determined by Mr. Silver's assertion. Mr. Silver's testimony was in fact a double-edged sword. Although the merits of the case have been resolved, Mr. Silver chose to use the issues in the case as a weapon to justify sanctions against plaintiffs. As such his hearsay testimony is not

admissible. See *Trevizo v. Astec Industries, Inc.*, 156 Ariz. 320, 751 P 2d 980, 982 (App. 1987) (introduction of a statement of belief to prove the fact believed is prohibited). Mr. Silver was introducing statements made to him by plaintiffs' witnesses to try to show that plaintiffs were engaged in fraud and therefore subject to sanctions.

Furthermore defendant failed to notify plaintiffs in advance that Mr. Silver planned to use hearsay testimony to show state of mind, as required. Moreover, self-serving declarations are inadmissible, particularly when they come from the attorney himself. Mr. Silver's state of mind was predetermined; he had a "whatever it takes" attitude to find some way of discrediting the plaintiffs. It is Mr. Silver who has committed wrongful acts in this case, including perjury and witness tampering, and he should not be permitted to hide behind a "state of mind" argument.

Plaintiffs were justified in questioning Mr. Silver about these matters, and the court erred in sustaining the objections to these questions.

## C. SURPRISE WHICH COULD NOT HAVE BEEN PREVENTED BY ORDINARY PRUDENCE.

Although defendant emailed his Notice of Lodging of Defendant's Proposed Findings of Fact, Conclusions of Law and Form of Judgment with thirty-three (33) Exhibits attached on November 6, 2006 to plaintiffs, his attorneys knew that plaintiffs were traveling

to Phoenix on that date and would not receive them. Defendant hand delivered these materials to plaintiffs at 1:30 p.m. November 7, 2006, in the courtroom. Plaintiffs therefore had no way of avoiding the surprise. Defendant had advised he would have his exhibits at the status conference on July 27, 2006, but he did not offer them for plaintiffs to examine. He could have provided them to plaintiffs during the intervening period but did not, and furthermore defendant stonewalled plaintiffs' request for production of documents.

And as already pointed out, defendant failed to advise plaintiffs of his intention to introduce hearsay testimony.

## D. EXCESSIVE DAMAGES

The original lawsuit in this case was subject to compulsory arbitration because the amount at issue was only $16,500. Even after appeal to the superior court, the amount was only $74,000. Although the court of appeals noted that fees in excess of the amount in controversy were not prohibited, it pointed out that the original judgment exceeded this by approximately $44,000, which was one of the reasons why the matter was remanded for hearing. The decision of the court of appeals constitutes the law of this case and must be followed.

Instead of reducing the fees awarded to defendant, the court drastically increased the fees, to a total of nearly $280,000, in addition to more than

$16,000 paid by plaintiffs to satisfy the first supplemental judgment. Based on the evidence presented at the hearing in plaintiffs' Exhibit 37, the total should not have exceeded $40,000, including the amount already paid in the 1st Supplemental Judgment.

## E. ERROR IN ADMISSION AND REJECTION OF EVIDENCE.

As pointed out under Irregularities of the Proceedings of the Court, it was error of the court to admit evidence of fees generated after the original and three supplemental judgments. It was error to admit evidence of fees generated, not only for the hearing itself, but for all fees generated since the third supplemental judgment. This limitation was established by Judge Swann in the status conference on July 27, 2006.

And as also pointed out under irregularities of the proceedings of the prevailing party, it was error for the court to admit hearsay testimony by defendant's attorney Leon Silver, Esq.

## F. THE FINDINGS OF FACT ARE NOT JUSTIFIED BY THE EVIDENCE.

### 1. The Court Erred by Entering a Verbatim Copy of Defendants Proposed Findings of Fact.

By entering a verbatim copy of defendant's proposed findings of fact and conclusions of law, even

including a typographical error (Page 10, line 17: the date of Mr. Levy's Declaration was March 10, not May 10), the court indicated its failure to give due consideration to evidence obtained at the three hearing sessions. Each and every material proposed fact was refuted by plaintiffs' Objection to Defendant's Notice of Proposed Findings of Fact, Conclusions of Law, and Form of Judgment, with Argument and Testimony by Plaintiffs, filed in this court on November 15, 2006 (HEARING III), incorporated herein by reference. The evidence presented by plaintiffs in the Declaration of Robert A. Levy attached thereto shows that defendant's proposed findings of fact are not justified, and that a new trial on all issues is required.

**2. The Court Erred by Ignoring Evidence of Witness Tampering by Defendant's Attorney.**

Paragraph 23.b of the Declaration of Robert A. Levy, attached to Hearing III points out evidence of witness tampering by Mr. Silver on plaintiffs' witness Jim Wenger. The cross-examination of Mr. Silver illustrates his tampering with Mr. Wenger, Transcript of HEARING II at 23:22 to 34:22. Mr. Silver keeps trying to say that it was Mr. Levy who told Mr. Wenger what to say in Exhibit 20 (Mr. Wenger's affidavit's of July 25 2003), but a reading of the affidavit shows that it was impossible for this to have been the case. For example, how could Mr. Levy have told Mr. Wenger what to say in Paragraph 10 of Exhibit 20?

At 27:24-25: "My client claims they were taking the manure from the pile." and then he quotes Mr. Wenger as saying "Well yeah they could have been doing that."

How preposterous! Mr. Englund ran a horse boarding operation which generated large amounts of horse manure continuously, and Mr. Silver is trying to maintain that Mr. Englund's people come over to the Levys' lot to pick up manure and take it back. Mr. Silver is fabricating his testimony out of whole cloth. He is the one who is telling Mr. Wenger what to say, not the Levys, Transcript, HEARING II 26:9-26:15. The hearsay statements made by Mr. Silver regarding Mr. Wenger's statements cannot possibly square with what he said in his July 25 affidavit. Mr. Silver could have obtained an affidavit from Mr. Wenger saying these things, but he did not. Nor did he depose or produce Mr. Wenger for testimony at the hearing.

See also Mr. Silver's testimony at HEARING II Transcript 34:8-34:12. Mr. Silver says he had a lengthy conversation with Mr. Wenger before trial. Yet the second affidavit he obtained from Mr. Wenger as the result of that meeting was signed on December 30, 2003, more than a month after the case had been dismissed. Mr. Silver would have been able to tell Mr. Wenger that the case had been dismissed and he would be free to say anything that Mr. Silver wanted him to say.

It is Mr. Silver who should be sanctioned in this case, not the Levys, and plaintiffs should not be liable

for time Mr. Silver spent engaged in these wrongful activities.

## G. THE JUDGMENT IS CONTRARY TO LAW.

### 1. This Court May Award Fees Generated in an Appellate Court Only Upon Specific Authorization of the Appellate Court.

The judgment includes an award for attorneys' fees generated in the Arizona Court of Appeals and Arizona Supreme Court (see Paragraph 47 of the Conclusions of Law). This court has no independent jurisdiction to award any fees, costs, or other expenses resulting from litigation in an appellate court, Rule 21, Arizona Rules of Appellate Procedure.

The Order of the Court of Appeals dated December 7, 2006, supports this position. First of all, the court of appeals' order was entered on December 7, 2006, more than two weeks after entry of the Judgment of this Court, and it denied defendant's request for attorneys' fees on the Special Action. It specifically pointed out that only if the defendant is ultimately the prevailing party and if the matter is shown to arise out of contract, may he then apply for fees on appeal in this court.

Moreover, on the original Memorandum Decision, if defendant thought himself entitled to fees, he should have applied for them within ten days of decision pursuant to ARCAP 21, or at least ten days from the amended decision, which he did not. He is

therefore not entitled to claim those fees either. And as pointed out again in the Memorandum Decision, he cannot claim these fees under a sanction statute unless they are awardable under the rules pursuant to a specific violation. It should be noted that in spite of defendant's repeated motions for sanctions in this court prior to the trial date, all such motions were denied by this court, as acknowledged by Mr. Silver (HEARING II Transcript 53:10-12). Defendant has failed to establish any independent basis for sanctions. Moreover, the sanctions demanded by defendant rely entirely on inadmissible hearsay testimony by Mr. Silver; there is therefore no valid basis for them to be awarded. As pointed out earlier, it is not Mr. Silver's state of mind which plaintiffs are being sanctioned for; it is the prohibited hearsay statements made by Mr. Silver.

Finally, the court lacks the inherent power to sanction plaintiffs via appellate court attorneys' fees because the Court of Appeals, in ruling on the Special Application, specifically denied defendant's application for fees based on sanctionable conduct, with prejudice.

**2. Plaintiffs Prevailed on the Original Judgment, Thereby Precluding Defendant from Entitlement to Any Fees and Costs Following the 3rd Supplemental Judgment.**

The judgment entered on November 21 2006, allowed costs to defendant of $1825.00. Since this amount is less than the amount of costs ($3011.50) awarded in the original judgment entered February 2, 2004, plaintiffs are the prevailing party on remand, and defendant is therefore entitled to no fees, costs, or other expenses subsequent to the 3rd supplemental judgment, since only the prevailing party may be awarded fees or costs.

The hearing was held pursuant to the mandate of the Court of Appeals, which provided that the original, second supplemental, and third supplemental judgments for attorneys' fees be remanded for hearing. This ruling was reinforced by the holding by Judge Swann at the status conference. The "judgment from nearly three years ago" is the controlling judgment for this hearing, and the amount of costs awarded to defendant was less than that awarded at the hearing, thereby making plaintiffs the prevailing party on remand. Thus the fee ceiling for defendant is the sum total of the fees in the original, second supplemental, and third supplemental judgments, with the reduced cost total. Any other fees and costs generated are not allowable because only the prevailing party may be awarded fees in any attorneys' fee statute.

### 3. Non-taxable Litigation Expenses Are Not Allowable.

In addition to attorneys' fees and costs awarded to defendant, this court warded $19,811.00 in non-taxable litigation expenses, including expert witness fees. Since there is no statutory basis for recovery of such expenses, this award constitutes an error by the court.

### 4. No Basis Exists for Award of Damages under A.R.S. § 12-349(A).

The court erred in awarding defendant damages of $5,000.00 pursuant to A.R.S. § 12-349(A) because defendant failed to establish any grounds for such award, other than his own bare assertion.

## CONCLUSION

Wherefore plaintiffs request that this court grant a new trial on all issues. If a new trial is granted, plaintiffs request that the funds paid to satisfy the judgment be returned to plaintiffs and that any attorneys' fees generated in connection with the first hearing be eliminated from any award to defendant.

Respectfully submitted on this 2nd day of January, 2007.

*/s/ Robert A. Levy*
Robert A. Levy

*/s/ Phyllis B. Levy*
Phyllis B. Levy

Robert A. Levy and Phyllis B. Levy
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FAX: (915) 533-4327

**IN THE SUPERIOR COURT**
**OF THE STATE OF ARIZONA**
**IN AND FOR THE COUNTY OF MARICOPA**

| | |
|---|---|
| **Robert A. Levy and Phyllis B. Levy,** **Plaintiffs,** **v.** **William A. Englund,** **Defendant.** | **No. CV2001-011987** **DECLARATION OF JIM WENGER** **(Assigned to the Honorable Robert L. Gottsfield)** |

I, Jim Wenger, declare as follows on personal knowledge:

1. I am over the age of twenty-one years and am competent to testify to the matters stated herein.

2. My profession is that of horse trainer.

3. I operated an independent horse training facility at a 5-acre horse boarding facility located at 2735 E. Rose Garden Lane, Phoenix, Arizona (Lot 12, Mohawk Park) from 1992 until August, 2000.

4. This facility was named the Big Sky Equine ranch from 1994 to 2000, when it was owned and

operated by Joyce Palmer, with her daughter Laura Palmer.

5. Directly to the south of the Big Sky ranch is a vacant 5-acre parcel of land that fronts on Mohawk Lane.

6. Directly to the east of the 5-acre vacant parcel is another 5-acre horse boarding facility known as the Be Lazy Ranch at the corner of Mohawk Lane and 28th Street.

7. During the time that Joyce Palmer operated Big Sky Equine, I saw individuals coming from the Be Lazy Ranch with tractors and wheelbarrows full of manure and dump the manure on the vacant parcel 5-acre parcel.

8. They would dump the manure at a location a few yards directly west of the gates opening from the Be Lazy Ranch onto the vacant parcel.

9. I observed this manure dumping taking place on a regular basis at least two or three times a week, all during the time that Joyce Palmer operated the Big Sky Equine ranch, including the time when she was sick with cancer, and after she died in June of 2000. The dumping was still going on at the time I left the ranch in August, 2000.

10. I had mentioned this dumping to Joyce Palmer, and she told me that she had been informed by the people at Be Lazy that they had permission from the owner of the vacant parcel to use it for dumping manure.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 25, 2003.

s/ James L Wenger
Jim Wenger
4443 E. Michelle
Phoenix, AZ 85032

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SBN 012884

Attorneys for Defendant William A. Englund

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

| | |
|---|---|
| **Robert A. and Phyllis B. Levy, husband and wife,** **Plaintiffs,** **v.** **William A. Englund, a single man,** **Defendant.** | **Case No. CV2001-011987** **SUPPLEMENT TO DECLARATION OF JIM WENGER** **(Assigned to The Honorable Robert L. Gottsfield)** |

Jim Wenger, subject to the penalty of perjury, and on my own personal knowledge, hereby declare:

1. On July 25, 2003 I executed a Declaration in this matter at the Request of Robert Levy.

2. The testimony in the Declaration was provided to Mr. Levy in a telephone conversation shortly before the Declaration was signed.

3. In that conversation I expressly told Mr. Levy that I could not and would not testifly that the people I saw dumping manure on the 5 acre vacant parcel were the employees or agents of the Be Lazy Ranch.

DATED this 11? day of August, 2003.

s/ James L Wenger
Jim Wenger

Leon B. Silver, Esq., SBN 012884
KELLER ROHRBACK, P.L.C.
3101 N. Central Ave., Suite 900
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(602) 248-0088

Attorneys for Defendant
William A. Englund

**IN THE SUPERIOR COURT**
**OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

| | |
|---|---|
| **ROBERT A. and PHYLLIS B. LEVY, husband and wife,** | **Case No. CV2001-011987** |
| **Plaintiffs,** | **DECLARATION OF JIM WENGER** |
| **v.** | **(Assigned to the Honorable Robert Gottsfield)** |
| **WILLIAM A. ENGLUND, a single man,** | |
| **Defendant.** | |

Jim Wenger, subject to the penalty of perjury does hereby declare:

1. That on July 25, 2003, at the request of Robert and Phyllis Levy, I executed a declaration.

2. Mr. Levy drafted the declaration, and presented it to me to review and sign shortly after a phone conversation I had with him regarding my potential testimony.

3. In the course of my conversation with Mr. Levy, Mr. Levy never informed me that Mr. Englund at one time had a lease that allowed him and his employees to make use of the Levy property. Rather, Mr. Levy lead me to believe that the issue in the lawsuit was merely whether someone from the Englund property had ever used the Levy property. In the time that I worked for Mrs. Palmer (on the property directly north of the Levy property) I did in fact observe people coming from the Englund property on to the Levy property, and so stated in that declaration.

4. Had I known that the issue in the case was whether any of these uses occurred after a specific date, namely January 1, 1999, I would not have signed the declaration the way it was written.

5. Rather, I could not state under oath that any of the occurrences that I witnessed happened after January 1, 1999, and if called to testify in this matter, I would limit my testimony in that regard.

6. Additionally, in that phone conversation, Mr. Levy informed me that the Defendant had been dumping manure on the manure pile on his property. Mr. Levy did not disclose to me that Mr. Englund claimed that his employees were not dumping manure in the piles, but rather were taking manure from the piles to use in their horse operation. Had Mr. Levy disclosed this to me, I would have told him, and would have testified to the fact that I could not tell from my observations whether the people I saw

on the property were either dumping or removing manure. All I saw was people driving a tractor from the Englund property to the manure pile and then back to the Englund property.

Dated: 12-30-03 s/ James L Wenger
Jim Wenger

## AGREEMENT OF LEASE

Robert and Phyllis Levy and H Lazy K Equestrian Stables, Inc. agree to enter into an agreement that H Lazy K can have use of property located at 2700 E. Mohawk (Lot 9, Mohawk Park) for equestrian purposes at a rate of $200 per month. This agreement is to remain in force as long as H Lazy K Equestrian (or a similar equestrian operation owned by Dennis and Yvonne Hilker) is operating at 28th Street and Mohawk.

In the event that said equestrian operation is moved and/or property (Lot 10 Mohawk Park) is sold, the said lease would be terminated with a 60 day notice.

The effective date of this lease is January 1, 1990. Beginning January 1, 1991, the monthly rent will be $250.00

It also is understood that the Levys can terminate said lease with 60 days notice.

In consideration of H Lazy K's use of the property since 1987, the Levys are guaranteed a minimum of 24 months lease from the date of the lease.

H Lazy K Equestrian agrees to hold Levys harmless for any acts of negligence or other liability occurring on the property and will keep insurance protection in force for this purpose with the Levys as additional named insured parties, and will provide Levys with copies of such insurance policies.

The Levys may install underground utilities on the property if they so desire, giving H Lazy K reasonable notice of their intention.

Property cannot be sublet for any other purpose than equestrian use without Levys' written approval.

H Lazy K will not place any permanent structures on property without written consent.

Levys must give H Lay K 60 days notice if property is sold and/or converted to any other use.

Upon termination of this lease, H Lazy K agrees to return property to Levys in good order and condition.

August 2, 1990

s/ Robert A. Levy
Robert A. Levy

Phyllis B. Levy

H Lazy K Equestrian Stables
By: s/ Yvonne K. Hilker, Secty

## AGREEMENT OF LEASE

Robert A. and Phyllis B. Levy (lessors) and William A. Englund (lessee) enter into the following agreement of lease whereby lessee shall have exclusive use of lessors' property, Lot 9 Mohawk Park (the Lot).

1. TERMS The term of said lease is for a period of four years, commencing on August 1, 1994, and ending on December 31, 1998.

2. RENTS The rent for said lease shall be the sum of $13,250.00, payable in 53 equal installments of $250.00 beginning at the signing of the lease and thereafter monthly beginning September 1, 1994. In addition, lessee agrees to pay lessors, as they come due, any increases in the annual taxes on the Lot for the years 1994-1998 above those of the 1993 tax year, which amounted to $2100.

3. INJURY OR LOSS Lessee agrees to hold lessors harmless for any acts of negligence or other liability occurring on the Lot and will keep insurance protection in force for this purpose with lessors as additional named insured parties, and will provide lessors with copies of such insurance policies.

4. UTILITIES Lessors may install underground utilities on the Lot if they so desire, giving lessee reasonable notice of their intention. At the present time no utilities are available.

5. USE OF Lessee may not sublet, place permanent structures upon, or use the Lot for purposes other than equestrian without written approval of lessors. Any

improvements shall remain the property of the lessors at the termination of this lease.

6. SURRENDER OF PREMISES Lessee shall, upon expiration of the terms of the lease quit and surrender the premises in good order and condition, reasonable wear and tear and acts of God excepted.

7. RENEWAL OF LEASE Lessors agree to entertain an intention by lessee to renew this lease at its expiration thereof, provided the same is made at least ninety (90) days prior to the expiration of this lease. Such renewal shall be accomplished by an addendum to this lease on terms mutually agreed upon.

8. NOTICE OF SALE Lessors shall extend to lessee the "first right of refusal" if the Lot is going to be sold. Lessors shall furnish lessee a copy of the offer that they have received. If Lessee declines to meet the offer, lessors may at their option, terminate the lease and conclude the sale.

s/ Robert A. Levy
Robert A. Levy

s/ Phyllis B. Levy
Phyllis B. Levy

s/ William A. Englund
William A. Englund